(1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL MCGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNET; ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH, HAROLD O. LEVY; and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO as Director of the Urban Development Corporation,

Petitioners,

—v.—

(caption continued on inside front cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Barbara G. Billet*
Solicitor General

Peter H. Schiff
Deputy Solicitor General

Nancy A. Spiegel
Marion R. Buchbinder
Robert M. Goldfarb
Alicia R. Ouellette
Assistant Attorneys General

**Counsel of Record*

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Petitioners
The Capitol
Albany, New York 12224
(518) 474-8101

238 pp

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. Where the State has never mandated a dual school system and has long prohibited *de jure* segregation, whether state education officials may incur liability under the Equal Protection Clause of the Fourteenth Amendment based on the alleged influence of the racial motives of others in the officials' determination of whether and to what extent to invoke discretionary state law remedies to reduce local school segregation.

2. Whether Congress abrogated the States' Eleventh Amendment immunity in the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. § 1701, *et seq.*, where there is no express provision to that effect and the legislative history contains no indication that such abrogation was intended.

3. Whether the scope of the EEOA is coextensive with the Fourteenth Amendment or whether it imposes affirmative obligations beyond what is constitutionally required.

4. Whether the "continuing violation" doctrine serves to toll the statute of limitations against a public benefit housing development corporation sued more than twelve years after it completed construction of subsidized housing, based upon claims that the siting of this housing had the foreseeable effect of indirectly furthering the segregative goals of local authorities.

LIST OF PARTIES

The GOVERNOR OF THE STATE OF NEW YORK, sued only in his official capacity, was an appellee in the court below. The district court's dismissal of all claims against the Governor was not disturbed by the Second Circuit. Thus, he is not named as a petitioner in this Court because he is no longer an interested party. All other parties in the court below are listed in the caption to this petition, with parties sued only in their official capacities substituted, where appropriate, pursuant to Rule 35.3 of the Rules of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. _____

THE STATE OF NEW YORK, *et al*,

Petitioners,

—v.—

YONKERS BOARD OF EDUCATION, *et al*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 23, 1996. The court held state officials liable under 42 U.S.C. § 1983 for claims arising from the racially segregative acts of municipal and local education officials. The court further held that the State's Eleventh Amendment immunity was abrogated by Congress in the Equal Education Opportunity Act, 20 U.S.C. § 1701, *et seq.*, and that the State and its educational entities are liable for claims arising under that act.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit for which review is sought is reported at 96 F.3d 600 (2d Cir. 1996), and is reproduced in the appendix at 1a. The underlying opinions of the District Court for the Southern District of New York are reported at 880 F. Supp. 212 (S.D.N.Y. 1995) and 888 F. Supp. 591 (S.D.N.Y. 1995), and are reproduced in the appendix at 56a and 118a, respectively.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was rendered and judgment entered on September 23, 1996. An order denying petitioners' petition for rehearing was issued on January 13, 1997. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to this action are the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, (193a), 42 U.S.C. § 1983 (193a), and 20 U.S.C. §§ 1703, 1706 and 1720 (193a-195a).

STATEMENT OF THE CASE

A.

This case, the twists and turns of which have taken on epic proportions, was commenced in 1980 by the United States against the City of Yonkers ("the City"), the Yonkers Board of

Education ("the Yonkers Board") and the Yonkers Community Development Agency. None of the present petitioners was named as a party. The complaint alleged, among other things, that the Yonkers public schools were racially segregated and sought the court's remedial intervention. Shortly after the action was commenced, the Yonkers Branch of the National Association for the Advancement of Colored People ("NAACP") was granted permission to intervene as a plaintiff.

Following several years of discovery and a lengthy trial, the district court concluded, *inter alia*, that the racial segregation of the Yonkers public schools was the result of intentional discrimination by the City and the Yonkers Board. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1388-1545 (S.D.N.Y. 1985) ("*Yonkers I*"). This conclusion was based on a thirty-five year history of segregative housing actions by the City, *id.* at 1294-1376, combined with an interrelationship between the City's housing practices and the Yonkers Board's neighborhood school policy, *id.* at 1500-1503, as well as a multitude of individual actions taken by the Board over a forty-five year period. *Id.* at 1388-1500. In May 1986, the district court issued an order against the City and the Yonkers Board requiring immediate implementation of a desegregation plan calling for redistricting, magnet schools and voluntary busing for the Yonkers public schools. *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986) ("*Yonkers II*"). The Second Circuit affirmed the judgment of the district court in all respects. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

None of the segregative actions examined by the district court was found to have been taken as a result of state policy or at the suggestion of a state agency or official. *See Yonkers I*, 624 F. Supp. at 1388-1545.

B.

The State of New York, its Governor, the Board of Regents and its members, the State Education Department and the Commissioner of Education, and the Urban Development Corporation of the State of New York ("UDC") and its Director (collectively, "the state parties"), became involved in this matter for the first time on September 17, 1987, when the Yonkers Board moved for leave to amend its answer to assert a cross-claim against them. A week later, the NAACP moved for leave to file a second amended complaint to assert a claim against the state parties. The United States opposed the motions, which were nonetheless granted on January 19, 1989.

The amended pleadings alleged that various actions and inaction of the State and its educational entities and officials had a "chilling effect" (149a) and a "negative impact" (152a) on the initiation by Yonkers of unspecified projects and plans for racial integration. With respect to the UDC and its Director, the pleadings claimed that by building approximately 1800 units of subsidized housing in southwest Yonkers prior to 1975, the UDC had "exacerbated" residential and school segregation in Yonkers (153a). The amended pleadings alleged claims arising under the Equal Protection Clause of the Fourteenth Amendment and related implementing statutes. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202 (142a, 159a). Relief was sought directing the state parties "to help implement and fund a plan," "to eradicate the effects of segregation" and to "participate" in the existing desegregation plan (155a). The state parties sought unsuccessfully to have the complaint against them dismissed for failure to state a claim upon which relief could be granted and on Eleventh Amendment grounds.

The district court thereafter held two trials. The first, in 1993, addressed the question of whether there were "vestiges" of past segregation still present in the Yonkers school district.

The court reasoned that if there were no vestiges, no additional relief would be required and the state parties would be entitled to dismissal of all claims against them. After a three week trial, the court issued an opinion finding that vestiges of past segregation remained. *See United States v. City of Yonkers*, 833 F. Supp. 214 (S.D.N.Y. 1993).

A second, six week bench trial was held in 1994 on the question of whether the state parties should be required to participate in the elimination of the vestiges of *de jure* segregation of the Yonkers schools. By agreement of the court and the parties, the evidence considered was limited to the parties' conduct prior to 1985,[1] when the court made its finding that the City and the Yonkers Board had engaged in *de jure* segregation.

During the second trial, it was established that New York State has never mandated a dual school system and has affirmatively prohibited *de jure* segregation since 1900, *see* 1900 N.Y. Laws, c. 492, codified at N.Y. Educ. Law § 3201(1) (McKinney 1995), and that as a matter of policy, the Board of Regents has long sought the elimination of all school segregation, be it *de jure* or *de facto*. *See* 1960 Regents Statement on Intercultural Relations in Education (Trial Ex. 3-1; 170a) and 1975 Regents Statement on Racial Integration of Schools (Trial Ex. 3-15; 173a). Trial proof also showed that, during the period in question, the State Education Department assisted local school districts in eliminating segregation by, among other things, providing technical assistance and support. *See, e.g.*, Report on the Education Department's School Desegregation Efforts Over the Past Three Years (January 19, 1981) (Trial Ex. 14-58; 176a). It also assisted those who wished to petition under Education Law § 310[2] for review of

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[1] Since it had ceased all housing activities in 1975, there was no need to address the temporal scope of the evidence to be adduced with respect to UDC.

[2] Education Law § 310 permits any person who is aggrieved by any action or inaction by a local school district, whether related to deseg-

any school district's actions or inaction with respect to desegregation. The evidence established that, between 1968 and 1987, at least 48 decisions concerning desegregation were issued under § 310, and in each, implementation of desegregation plans was ordered (Trial Exs. C-1- C-48).[3]

Additional proof adduced at trial showed that, as it did with school districts statewide, the State Education Department sought to encourage and assist Yonkers to achieve desegregation. These efforts were largely spurned by local authorities and were also severely hampered by the curtailment of state funding for the Department as a whole in the wake of the economic collapse of New York City in the mid-1970s (Trial Exs. FF-7, FF-9; Tr. at 161, 244). *See, e.g., Yonkers I*, 624 F. Supp. at 1469 (despite grant provided to Yonkers from the State Racial Balance Fund, efforts to develop desegregation proposals were discontinued due to district superintendent's reluctance to pursue such proposals). Ultimately, when the "carrot" proved unavailing, the Department tried the "stick" by withholding for the entire 1983-84 school year state magnet funds that had been appropriated by the Legislature for Yonkers (Trial Exs. FFF, GGG). Similar action was taken the next year (Trial Exs. DDDDD, EEEEE), the last year for which proof was taken.

Two opinions followed the 1994 trial, one issued in March 1995 and one in June 1995. Together these opinions formed the basis of the Second Circuit appeal.

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regation or any other matter, to commence a quasi-judicial proceeding before the Education Commissioner. N.Y. Educ. Law § 310 (McKinney 1988). Trial evidence established that § 310 petitions were not initiated by the State Education Department but rather were brought on by citizens of a school district (Tr. 1393-94, 2186, 2203). It was also established that no § 310 petition was ever submitted with respect to Yonkers (73a).

[3] *See, e.g., In the Matter of the Appeal of Burbank Mitchell*, 18 Ed. Dept. Rep. 9761 (1978) (Trial Ex. C-21); *In the Matter of the Appeal of Cleola Mae Sylvers*, 15 Ed. Dept. Rep. 9225 (1976) (Trial Ex. C-34).

In its opinion and order dated March 27, 1995 (56a), the district court dismissed all claims against the state parties predicated on the Equal Protection Clause. The court held the claims to be barred by the Eleventh Amendment insofar as asserted against the State, the State Education Department, the Board of Regents, and the Governor (87a-89a).[4] As against the individual Regents and the Commissioner of Education, the court held that the claims were precluded by the Second Circuit's decision in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978) (90a, 117a). The claims asserted against the UDC and its Director were dismissed as barred by the three-year statute of limitations applicable in New York to actions brought under 42 U.S.C. § 1983 (110a-112a).

The district court then turned to what it termed its "dialogue . . . with the parties relating to the relevance of a federal statute that was not otherwise cited [in the complaint] nor relied upon . . . as to any substantive questions of liability" (103a). The court expressed the view that the language of the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et. seq.* ("EEOA"), could provide a basis for holding a State vicariously liable for *de jure* school segregation at the local level (105a). It then "[left] to another day and any further application of the parties" the question of whether the EEOA could provide any basis for relief (108a).

Thereafter, respondents moved to amend their pleadings yet again, to assert a claim under the EEOA. In a second decision dated June 14, 1995 (118a), the district court permitted the amendment but denied relief (123a-126a). The court ruled that the allegations against the state parties under the EEOA failed to state a claim upon which relief could be granted because that statute was not intended to afford protections

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[4] The dismissal of the Governor from this lawsuit was not challenged in or addressed by the Second Circuit. Accordingly, he is no longer a party.

against racial discrimination beyond those provided by the Fourteenth Amendment (123a-125a).[5]

C.

The Second Circuit vacated the dismissal of both the equal protection and EEOA claims (44a, 50a, 55a). With respect to equal protection, the court held the Regents and the Commissioner of Education responsible for the *de jure* segregation which, as described in *Yonkers I*, had been created solely by the City and the Yonkers Board. It also held that the State itself, the State Education Department and the Board of Regents, while immune from liability under § 1983 by virtue of the Eleventh Amendment, could incur liability for that segregation under the EEOA, which was held to abrogate that immunity. With respect to the UDC and its Director, the court directed the district court to "reconsider its view of the duration of UDC's liability" (54a).

The court reasoned that just as the City and the Yonkers Board had been found constitutionally liable in *Yonkers I* because they intentionally created segregated schools in response to community pressure they knew to be racially motivated, the Regents and the Commissioner were constitutionally liable because their actions and omissions, which had the foreseeable effect of perpetuating known segregation, were undertaken in response to legislative pressure they knew to be racially motivated (44a). Four factors were cited as dispositive of liability: (1) the Regents and the Commissioner

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[5] The district court held the EEOA inapplicable for the additional reason that the court had not made the findings required by the EEOA when it entered the 1986 desegregation order. The district court believed it would be inconsistent with congressional intent to require the State to participate in a remedial plan that did not comport with the requirements of a statute applied retroactively to it. In addition, the court believed it would be unsound to reopen questions relating to a remedial plan adopted and implemented a decade before (125a-126a).

knew that segregation existed in the Yonkers school district; (2) they had actual or constructive knowledge that the segregation in Yonkers was *de jure*; (3) they had the power to remedy the segregation; and (4) their failure to exercise their power in a way which the court believed would have been effective was due to political pressures they knew to be racially motivated (31a-32a). The court wrote that "[e]ven if an official had no statutory duty to act, he may be [constitutionally] liable if his refusal to act was a response to pressures that were known to be racially motivated" (31a).

In regard to the EEOA, the Second Circuit *sua sponte* ruled that the language of 20 U.S.C. § 1703 that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" serves to "expressly abrogat[e] the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA" (46a). No decision of this Court was cited in support of that conclusion.

The court then disposed of the district court's concern that the EEOA could not impose "supervisory liability" on the state parties because it was intended to be coextensive with the Fourteenth Amendment, which does not impose such liability. Agreeing with *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1347-48 (6th Cir. 1978), the court held that the EEOA imposes "supervisory liability" on States which provide financial assistance to school districts engaging in discriminatory conduct while failing to take action requiring those districts to bring the operation of their schools into compliance with the Fourteenth Amendment (48a-49a). The court then expressed its view that this same "supervisory liability" is imposed directly by the Fourteenth Amendment (50a).

Finally, the court vacated the district court's determination that the claims asserted against the UDC were not entitled to the "continuing violation" exception to the statute of limita-

tions, available only in school desegregation cases. Ruling that the UDC's lack of involvement in the establishment of school attendance zones did not necessarily render the "continuing violation" exception unavailable, the Second Circuit directed the district court to reconsider this issue in light of the court's holdings with respect to the equal protection and EEOA claims (52a-54a).

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision imposes upon the State of New York, its educational entities and certain of its officials, constitutional and/or statutory liability based on the view that the state parties were not vigorous enough in their pursuit, on a remedial basis, of the State's commitment to local school desegregation. The court's imposition of liability interjects the federal judiciary into the State's discretionary determinations of how best to manage its internal affairs, and effectively renders the State an insurer of the constitutionality of municipal behavior, regardless of how the State allocates responsibility for municipal functions, including the operation of its public schools.

Notably, the decision below contains virtually no citations to the decisions of this Court. This absence tacitly underscores the fact that the imposition of liability here disregards entire lines of this Court's decisions. The Second Circuit's reasoning is fundamentally at odds with that of this Court, and given the significance of the questions presented, this Court's review is respectfully sought.

POINT I

THE SECOND CIRCUIT'S HOLDING THAT STATE OFFICIALS SUED IN THEIR OFFICIAL CAPACITY ARE LIABLE UNDER THE FOURTEENTH AMENDMENT FOR FAILING TO COMBAT LOCAL SCHOOL SEGREGATION AS AGGRESSIVELY AS THEY MIGHT HAVE THROUGH REMEDIAL MEASURES, ABSENT ANY STATE PARTICIPATION IN OR CONDONING OF THE LOCAL DISCRIMINATORY ACTS, IS AN EXPANSION OF CIVIL RIGHTS LIABILITY BEYOND WHAT THIS COURT HAS ESTABLISHED

The Second Circuit's 1996 decision holding New York State education officials liable for the pre-1985 segregation of the Yonkers public schools diverges from, and in several respects is incompatible with, the civil rights precedents of this Court. First and most significantly, the court has created a basis of liability not previously adopted by this Court. Second, the court's conclusion that the state officials acted with the requisite discriminatory intent is based on an idiosyncratic view of the law that finds no support in the decisions of this Court. Third, by premising liability on the degree of effort made by state officials to combat local segregation, the decision is inconsistent with the principles of federalism and comity inherent in the federal Constitution and embraced by this Court.

a. The Imposition of Fourteenth Amendment Liability For the Perceived Failure of State Officials to Play a Sufficient Remedial Role As to Local Constitutional Violations Is Unsound

The Second Circuit imposed § 1983 liability on the Regents and the State Education Commissioner, sued solely in their official capacities, based on the alleged influence of the racial motives of others in their deliberation of whether and to what extent to invoke discretionary state law remedies to reduce

school segregation in Yonkers. In doing so, the court pursued a line of reasoning that stretches this Court's traditional view of causation and ultimately expands the scope of § 1983 liability well beyond what this Court has previously recognized.

Under the express language of 42 U.S.C. § 1983, liability attaches to a defendant who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction . . . to a deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . .". Whatever the context in which § 1983 claims arise, this Court to date has held the element of causation to be a requisite to any imposition of liability. *See e.g., Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413 (1977) (a finding that pupil population is racially imbalanced "standing by itself is not a violation of the Fourteenth Amendment in the absence of a showing that the condition resulted from intentionally segregative actions on the part of the Board"); *see also Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978) (a local governmental entity is liable under § 1983 only when its policy is a "moving force" behind the deprivation); *Rizzo v. Goode*, 423 U.S. 362, 377 (1976) (no supervisory liability arises where "the responsible authorities had played no affirmative part in depriving any [plaintiffs]. . . of any constitutional rights").

It is undisputed here that New York never created or authorized local school districts to create a dual school system. Indeed, since 1900, *de jure* segregation has been expressly prohibited. *See* N.Y. Educ. Law § 3201(1) (McKinney 1995), enacted by 1900 N.Y. Laws, c. 492, § 1. In addition, it has long been the policy of the Board of Regents to promote the elimination of all segregation, be it *de jure* or *de facto* (170a-175a). As noted above, the New York State Education Department has sought to implement this policy by assisting local school districts in the elimination of segregation by, among other things, providing technical assistance and support in the development of desegregation plans and investigating dis-

crimination complaints (Trial Ex. 14-58, 176a). It also has assisted those seeking to invoke the Commissioner of Education's quasi-judicial authority under New York Education Law § 310 to address a school district's actions or inaction with respect to desegregation, with many such petitions submitted and acted upon over the years (176a).

Thus, it simply cannot be maintained that the discriminatory acts of the City and the Yonkers Board over a period of forty or more years, which the district court found were responsible for the creation of *de jure* segregation in Yonkers, were undertaken at the behest of the State. No *state* actor created or caused to be created the local segregation, and no *state* governmental policy existed as the moving force behind the constitutional deprivation which occurred in Yonkers, and neither the district court nor the Second Circuit so found.

To the contrary, the district court expressly found "no evidence that State education officials ever adopted a policy that indicated specific approval of the manner in which Yonkers was managing the racial makeup of its schools" (75a). The district court also expressly stated:

> At this point, it is important to make clear what factual findings the record *does not* support. There is no evidence that State education officials ever undertook affirmative actions to preserve segregation in the Yonkers schools, or that they indicated to anyone in Yonkers, either tacitly or otherwise, that they thought that segregation in the schools should be preserved. There is no evidence that State education officials ever actively impeded Yonkers officials from taking steps on their own to remedy the school segregation. There is no evidence that State education officials ever communicated to anyone in Yonkers that they would purposefully "look the other way" should Yonkers decide to continue to be in violation of State desegregation policy. There is no evidence that State education officials ever adopted a policy that indicated specific approval of the manner in

> which Yonkers was managing the racial makeup of its schools. Finally, there is no evidence that, had a Yonkers citizen filed a desegregation § 310 [of the New York Education Law] petition, the State would not have responded to that petition promptly and fairly. Indeed, the record supports the finding that the Commissioners of Education in most instances enforced the racial integration policy in connection with proceedings brought before them by private citizens under § 310.

(75a; emphasis in original). The court added that "[t]he State made serious efforts to inform the Yonkers public as to how a private citizen or citizens' organization could trigger a State investigation under § 310" (75a n. 11).

The Second Circuit did not disturb these findings. It nevertheless imposed liability, based solely on its determination that the Regents and the Commissioner had the power to remedy local *de jure* segregation, of which they were held to have knowledge, and that, due to political pressures they knew to be racially motivated, they failed to exercise that power in a way the court believed would have been more effective (31a-32a). In short, the court's hindsight view that the state officials not only could, but should, have done more in Yonkers, became the implicit causal link between the State and the local constitutional violations—an "if not part of the solution, then part of the problem" theory of causation not previously embraced by this Court.

While it is certainly true that public education is a matter of great concern to the State, state education officials have not been given the responsibility for insuring that every one of the more than 750 school districts in the State adheres to federal and state law. As the New York Court of Appeals made clear in *Board of Educ., Levittown UFSD v. Nyquist*, 57 N.Y.2d 27, 43 N.E.2d 359 (1982), *app. dsmd., Board of Educ. v. Nyquist*, 459 U.S. 1139 (1983), a decision which the Second Circuit notably fails to discuss, the creation of the State Education Department did not oust the local school districts from their

historic role of "direct and meaningful control" over the "operation" of their schools. 57 N.Y.2d at 46, 439 N.E.2d at 367. The Court of Appeals explained that "[w]hat appears to have been contemplated when the education article was adopted at the 1894 [state] Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State." 57 N.Y.2d at 47, 439 N.E.2d at 368. The responsibility of running the public schools remains with the local school districts, as it has since public schools were established in New York. Under the Education Law, the State's role is to regulate, monitor and advise. *See id.*; N.Y. Educ. Law § 305(2) (McKinney 1988) and N.Y. Educ. Law §§ 2554(9), (11) and (13) (McKinney 1995).

The Second Circuit undertook no analysis of the respective state and local roles which exist as a matter of state law. Instead, the court emphasized the State's remedial authority (43a-44a), and cited, parenthetically, Education Law §§ 305(1) and 308, two general sections which give the Commissioner of Education the responsibility to enforce all of the provisions of the Education Law and state that the Commissioner shall have the duty to institute such proceedings as may be necessary to effectuate his enforcement power[6] (43a). These provisions have never been interpreted by the state courts or administrators as imposing a specific duty to take specific action with respect to the enforcement of a specific

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[6] Education Law § 310, which authorizes anyone "aggrieved" by any action of a school district to file a § 310 petition with the Commissioner to challenge such action, also empowers the Commissioner to initiate such proceedings. The trial testimony established that although there are about 250 proceedings under § 310 annually—covering, in addition to racial balance issues, such diverse subject areas as grading policies, special education, tenure rights, and pensions (Tr. 1393-94)—only one such proceeding during the period between 1968 and 1987 was initiated by the Commissioner himself. In that one situation, there was no aggrieved party within the district who could file a § 310 petition (Tr. 2186, 2203).

provision of the law in a specific locality. On the contrary, while the Commissioner and the Regents plainly have broad remedial *authority* , *see Vetere v. Allen*, 15 N.Y.2d 259, 206 N.E.2d 174, *cert. denied*, 382 U.S. 825 (1965), that authority has never been viewed as leaving the Commissioner and Regents without discretion as to where, when and how it will be exercised. *Cf. Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973) (in the area of civil rights the federal judiciary should not encroach on the freedom of executive agencies to exercise their considered judgment on whether to proceed by persuasion or coercive action).

The decisions in *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989), are instructive. There, the liability of state officials was alleged to arise from their failure to redress unconstitutional conditions at the local level, in those cases, in the county jails. The Fourth and Fifth Circuits rejected the claimed "supervisory liability," notwithstanding that state law required the state agencies to issue standards which they had the authority to enforce, because state law placed the responsibility for operating the county jails on the county rather than with the state agencies. *Bush*, 795 F.2d at 1206; *Reid*, 895 F.2d at 132. As explained in *Bush*, "[T]he effort by Texas to improve conditions at its 254 county jails is not subject to federal superintendence" 795 F.2d at 1204. Further, "[T]he enforcement of state law is the job of the states, and the federal civil rights statute may not be used to bootstrap alleged violations of state law into federal claims." 795 F.2d at 1209. *Contrast Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981), and *Penick v. Columbus Bd. of Educ.*, 663 F.2d 24 (6th Cir. 1981), *cert. denied* (both cases), 455 U.S. 1018 (1982) (holding the Ohio State Board of Education and Superintendent of Public Instruction liable for local segregation based primarily on the affirmative act of providing funding to the locality in the face of their specific statutory duty to withhold funding under the circumstances).

Even accepting the Second Circuit's view that the State and its education officials could have done more to deal with the problem in Yonkers, to suggest that the State acted to cause the constitutional violations, or that state entities or officials were somehow the moving force behind the Yonkers segregation, is truly to stand reality on its head. To nonetheless hold the state officials liable in such a circumstance, based only on the perceived failure of the state officials to play a sufficient remedial role, is to disregard the element of causation as currently understood and to create a basis of liability not previously adopted by this Court. *See, e.g., Milliken v. Bradley*, 433 U.S. 267 (1977) and *Milliken v. Bradley*, 418 U.S. 717 (1974) (where Michigan's liability as found by the lower courts was not presented to or reviewed by this Court). Certiorari is warranted on this basis alone.

b. The Extrapolation of Discriminatory Intent From the Same Perceived Failure to Remediate Sufficiently Has No Support in Decisions of This Court

This Court has made clear that proof of an equal protection violation in the school context, when there has never been a statutory dual school system, requires proof "not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Keyes v. School Dist. No. 1, Denver Colorado*, 413 U.S. 189, 196 (1973). *Accord Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. at 420. The requirement that discriminatory intent be shown is inherent in the Fourteenth Amendment. Because that amendment "guarantees equal laws, not equal results," *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979), "purposeful discrimination is 'the condition that offends the Constitution'." *Id.* (citations omitted). *Accord Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

The district court's dismissal of the equal protection claim against the state officials in this action gave recognition to these principles. While evidencing its clear view that the State should have done more in Yonkers, the district court nevertheless was careful to note that the record showed neither complicity in nor approval of the unlawful segregative conduct of the City and the Yonkers Board on the part of the state parties (98a). The court did find that "the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation" (73a), and concluded that "the State essentially adopted a wait-and-see attitude. It asserted a willingness to help Yonkers help itself, but it would not force Yonkers to change" (75a). Despite this, the district court did state, as more fully set out *supra* at 13, that it found "no evidence that State education officials ever undertook affirmative actions to preserve segregation in the Yonkers schools or . . . ever actively impeded Yonkers officials from taking steps [to address the segregation] . . . [or] ever communicated to anyone in Yonkers that they would purposefully 'look the other way' should Yonkers decide to continue to be in violation of State desegregation policy" (75a).

While not disturbing these findings, the Second Circuit separately noted that "the district court found that the State had exhibited a 'determined reluctance to enforce its own desegregation policy in Yonkers' " (14a-15a), and concluded:

> Government officials, whether city or State, are not permitted to engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where their acts or omissions are undertaken in response to and in accordance with the segregative wishes of others that are known to be racially motivated.

(42a).[7]

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[7] As to the UDC and its Director, it is undisputed that the UDC had no involvement with Yonkers' schools and no policy in regard to

Integral to this conclusion is a significant, and improper, legal leap—from judicial dissatisfaction with the perceived reluctance on the part of state officials to proceed with enforcement of the State's desegregation policy, a reluctance manifested in a "willingness to help" but a determination not to "force change" (12a), to an implicit finding of discriminatory purpose on the part of those state officials. Such a leap is not countenanced under the governing precedents of this Court, and indeed is contrary to those precedents, which hold that "discriminatory purpose" implies more than "awareness of consequences" and requires a showing that a particular course of action was selected "at least in part 'because of', not merely 'in spite of', its adverse effect upon an identifiable group." *Feeney*, 422 U.S. at 279.

The record here may show that the State's desegregation policy was pursued with varying degrees of zealousness at different times and in different political climates, but it does not bespeak the discriminatory intent which is the *sine qua non* of constitutional liability. The Second Circuit's imposition of liability, in the absence of the heretofore requisite element of intent, is cause for this Court's review.

c. The Second Circuit's Decision Disregards of Fundamental Principles of Federalism and Comity

The Second Circuit's imposition of § 1983 liability is not only inconsistent with and greatly expansive of this Court's

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schools, much less an unconstitutional one (*see* 82a-83a). Moreover, the district court found that the agency had declined to exercise its statutory power to build housing in non-minority areas without local approval because one of its chief priorities was to build good housing promptly, it intended to market its housing pursuant to a plan which would have resulted in an integrated tenancy and it hoped to build additional housing in Yonkers on scattered sites (84a-85a). Nonetheless, the Second Circuit held that the UDC's housing had "long-term segregative effects on the schools" which were "easily foreseeable" (53a).

precedents in the several respects outlined above,[8] but it also has the untenable result of subjecting state officials to constitutional liability whenever, in the view of the federal courts, they fail to act quickly or thoroughly enough in response to unlawful municipal actions of which the States are held to have knowledge and the authority to correct. This result is inconsistent with basic principles of federalism and comity inherent in the federal Constitution and embraced by this Court.

In *Rizzo v. Goode*, 423 U.S. at 378, this Court observed:

> [w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law' [citations omitted].

See also Sandin v. Conner, ___ U.S. ___, ___, 115 S.Ct. 2293, 2299 (1995) ("federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *cf. Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977) ("[t]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary").

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[8] Moreover, in addition to this unwarranted expansion of the scope of constitutional liability, the Second Circuit also expanded the time period in which that liability may be asserted. Its reliance on the UDC's alleged indirect liability for school segregation to permit application of the "continuing wrong" theory to defeat UDC's statute of limitations defense, based solely on housing built by the agency more than twelve years before it was sued, extends that unique doctrine far beyond the narrow bounds by which it is currently circumscribed. The overall effect of the decision is thus to expose a virtually limitless array of governmental and quasi-governmental entities to liability for vestiges of school segregation, simply because their conduct in decades long past may have had the foreseeable effect of enhancing such segregation, no matter how indirectly.

Here, the Second Circuit has imposed § 1983 liability on state officials not for the creation of the constitutional violations which occurred at the local level and not for the imposition of any policy which served as the moving force for the unconstitutional conduct, but rather for the perceived failure of the state officials to play a sufficient remedial role as to the local constitutional violations. The language of § 1983 cannot be read broadly enough to support this imposition of liability, not only as a matter of intent and causation, but out of basic respect for the sovereignty of the States and their own determinations as to allocation of state and local control. The Second Circuit's clear departure from the principles of federalism articulated by this Court, which grant a state government "the widest latitude in the 'dispatch of its own internal affairs'," *Rizzo v. Goode*, 423 U.S. at 378, gives additional cause for this Court's review.

POINT II

THE SECOND CIRCUIT'S HOLDING THAT THE EQUAL EDUCATIONAL OPPORTUNITIES ACT ABROGATES THE STATES' ELEVENTH AMENDMENT IMMUNITY IS INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT

The Second Circuit's holding that the Equal Educational Opportunities Act, 20 U.S.C. §§ 1701-1758 ("EEOA" or "Act"), abrogates the States' Eleventh Amendment immunity cannot be reconciled with this Court's controlling precedents. Because of the novel and expansive liability imposed upon the State of New York, the Board of Regents and the Department of Education pursuant to the EEOA by the decision below, the Second Circuit's aberrant holding is worthy of review and correction by this Court.

This Court has consistently held that "Congress may abrogate the States' constitutionally secured immunity from suit

in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Put another way, this Court demands that the congressional intent to abrogate be manifest in "unequivocal statutory language." *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, ___, 116 S.Ct. 1114, 1123 (1996), *quoting Atascadero v. Scanlon*, 473 U.S. at 246; *see also Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("evidence of congressional intent [to abrogate] must be both unequivocal and textual").

Further, the Court has made clear that a statute's mere reference to, and imposition of obligations on, the State cannot substitute for the requisite unequivocal declaration that Congress is exercising its power to abrogate. *Dellmuth v. Muth*, 491 U.S. at 232. In addition, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero v. Scanlon*, 473 U.S. at 246. *Accord Dellmuth v. Muth*, 491 U.S. at 231; *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 476 (1987); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 787 n.4 (1991) ("[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim" [emphasis in original]).

In the decision below, the Second Circuit grounded its holding of abrogation *solely* on the EEOA's apparent imposition of obligations on the State and state educational agencies to ensure compliance with the Act (46a) ("[t]he Act * * * in providing explicitly that '[n]o State' shall engage in the prohibited conduct and in including within the prohibition acts by 'State educational agenc[ies],' obviously reflects Congress's intention to hold the states and their agencies liable"). Notably, the Second Circuit did not cite any decision of this Court in its decision on this issue.

The impermissibility of the Second Circuit's inference of abrogation on this solitary basis is plain under this Court's decision in *Dellmuth*. In *Dellmuth*, the respondent contended that the Education of the Handicapped Act's frequent reference to the States and delineation of the States' role in providing proper education for handicapped children evinced a congressional intent to abrogate the States' immunity. 491 U.S. at 232. This Court disagreed, stating:

> This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation. *Id.*

The Second Circuit's holding in the instant case simply cannot be harmonized with *Dellmuth*.

Furthermore, although not addressed by the court below, the EEOA's provision for suit in federal court does not reflect an unequivocal intent to abrogate the States' immunity. The Act provides that aggrieved parties "may institute a civil action in an appropriate district court of the United States *against such parties*, and for such relief, *as may be appropriate*." 20 U.S.C. § 1706 (emphasis supplied). First, as set forth above, a general authorization for suit in federal court is wholly insufficient to abrogate the States' immunity. *See Atascadero v. Scanlon*, 473 U.S. at 272 (general authorization for suit against "any recipient of public assistance," which State undisputedly was, held insufficient to abrogate its immunity). Second, this provision is by its very terms equivocal. By merely providing for suit against such parties "as may be appropriate," Congress was plainly reserving the question of appropriate defendants to the judiciary, to be assessed in light of, *inter alia*, defenses such as Eleventh Amendment immunity.

Finally, the fact that the Seventh and Ninth Circuits have also found the EEOA to abrogate the Eleventh Amendment on identically flawed grounds only underscores why certiorari is warranted in this case. *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946 (9th Cir. 1983). In both cases—decided before this Court's most recent pronouncements on the issue—the courts relied only on the apparent obligations on the States and the general authorization for suit in federal court as evincing a congressional intent to abrogate. *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d at 1037-1038; *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d at 946. Subsequent decisions of this Court, particularly *Dellmuth*, confirm that these holdings are erroneous.

In sum, the law of three circuits on this issue is currently in conflict with the controlling decisions of this Court. In the instant case, the EEOA is now being employed to impose vast, prospective liability on New York State and its educational entities for the vestiges of segregation, and will undoubtedly be wielded in a similar fashion in other States. Accordingly, the Second Circuit's annulment of the State's immunity in this case merits consideration by this Court.

POINT III

THE SECOND CIRCUIT'S EXPANSIVE INTERPRETATION OF 20 U.S.C. § 1703(b) AS IMPOSING ON STATES AN OBLIGATION TO ENSURE AGAINST CONSTITUTIONAL VIOLATIONS BY LOCALITIES IS INCONSISTENT WITH THE STATUTORY PURPOSE EXPRESSED IN THE STATUTE ITSELF AND A DECISION OF THE FIFTH CIRCUIT

The Second Circuit held that the State and its educational entities are liable under 20 U.S.C. § 1703(b), a provision of the EEOA, for their failure to take effective steps to deseg-

regate schools that were segregated in a municipality by local actors, despite the absence of any evidence of affirmative pro-segregation action by the State or state actors. Specifically, the Second Circuit interprets the EEOA as imposing on the States "the obligation to enforce the equal-educational-opportunity obligations of the local agencies" (47a), an obligation "to ensure compliance" (48a) and "vicarious liability" (49a). The imposition of an affirmative obligation to guarantee that localities do not commit constitutional wrongs and the resulting liability imposed against the State for injuries inflicted by localities under the Second Circuit's interpretation of the EEOA is irreconcilable with the express language of the statute, its history and its interpretation by the Fifth Circuit.

The EEOA is codified at 20 U.S.C. §§ 1701-1758. Its sole purpose is "to specify appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b). Virtually the entire statute is devoted to limiting the ways in which federal courts may proceed in remedying unlawful discrimination and to identifying and emphasizing those actions and conditions that *do not* constitute denials of equal educational opportunity. In fact, the only sections of the EEOA that do not specifically limit the availability of aggressive desegregation methods or set forth situations that do not create a need for desegregation are those provisions relating to jurisdiction, standing to bring suit and § 1703.

Taken by itself, the language in § 1703 that "no State shall deny equal educational opportunity" by actions of "an educational agency" might perhaps be read as imposing on the States affirmative obligations. However, since "educational agency" is defined in § 1720 as including both state and local educational agencies, the more natural reading is that "State" in this context is intended to be equated to state action, which, of course, can be actions of governmental actors at any level. Moreover, the statutory purpose as expressed in the statute itself would be perverted by construing the statute to increase rather than reduce the obligations on States.

This reading of the statute is confirmed by the ample legislative history to the statute[9] which reflects its clear purpose: specifically, the EEOA is an antibusing statute. It was intended to limit the situations in which States would be forced to bus students to eliminate segregation or the lasting effects thereof. There was no intent to impose on States additional obligations.

In particular, § 1703(b), the section the Second Circuit found to impose affirmative duties on the States, was specifically intended to reaffirm established constitutional law. The Senator who introduced the bill from the floor clarified the meaning of § 1703:

> First of all, there is an express prohibition against the denial of equal educational opportunity to any student on the basis of race, creed or color. That is *no change* from the basic principle of law laid down in the case of Brown against Board of Education which ended segregation of the races in schools. *This amendment does not change that in any respect.* As a matter of fact it reaffirms that law.
>
> Included among the prohibited practices are deliberate segregation or failure to eliminate a dual school system * * *. All of this is in the amendment *and all of this is, of course, basic fundamental law decided again and again in the last decade since the Brown case,* not only by the Supreme Court but also by courts of appeals and district courts. This amendment reaffirms all of that basic law.

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[9] *See*, House Rep. 93-805, February 21, 1974 (Comm. on Ed. and Labor), reprinted in 1972 U.S. Code Cong. & Admin. News at 4202-03 (Additional Views of Mr. Esch); 120 Cong. Rec. (House) 8262064 (March 26, 1974) (Esch); *id.* at 8281-82 (Nedzi); 120 Cong. Rec. (Senate) 14812 (May 15, 1974) (Gurney); Senate Conf. Rep. 93-1026 (July 23, 1974), reprinted in 1972 U.S. Code Cong. & Admin. News 4206, 4219; 120 Cong. Rec. (House) 25325-31 (July 25, 1974) (Quie); 120 Cong. Rec. (House) 26111 (July 31, 1974) (Quie).

Remarks of Sen. Gurney, Congressional Record, May 15, 1974, at 14815 (emphasis added). Thus, section 1703(b) does not place additional obligations on the States; nor does it give the courts an additional tool for fighting segregation. In fact, the statute expressly limits its own effect: "the provisions of this chapter are not intended to *modify* or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b) (emphasis added).

There is no constitutional duty on States to correct or prevent constitutional violations committed by a locality, but rather a prohibition against purposeful discrimination by the state actors. The Second Circuit's conclusion that the EEOA imposes such affirmative obligations on state entities is thus a conclusion that § 1703(b) is broader than the Fourteenth and Fifth Amendments. This interpretation is in conflict not only with the express language and history of the statute, but also with a decision of the Fifth Circuit which interprets § 1703(b) as coextensive with the Fourteenth and Fifth Amendments, prohibiting only purposeful discrimination by state actors. *See United States v. State of Texas*, 680 F.2d 356, 371, 373 (5th Cir. 1982). The Second Circuit did not address *United States v. State of Texas* in its decision. Instead, it cited a prior Fifth Circuit decision, *United States v. Hinds County School Bd.*, 560 F.2d 619, 623 (5th Cir. 1977), that is distinguished in *Texas* as not applying to § 1703(b).

In *United States v. State of Texas*, the Fifth Circuit reversed an order of the district court which required that Texas provide bilingual instruction to all Mexican-American children of limited English proficiency in Texas public schools, based in part on its interpretation of the EEOA, 20 U.S.C. §§ 1703(b) and (f). Among its many findings, the district court concluded that the State as a whole had discriminated against Mexican-American students, and that discrimination constituted a breach of § 1703(b). The Fifth Circuit discussed the findings of the district court and concluded that there was

insufficient evidence in the record "to prove that the state as a whole has in the past discriminated against Mexican-American students." 680 F.2d at 371. It thus held that the district court's conclusions that there were constitutional violations by the State could not stand. *Id.* at 371. The court then held that the § 1703(b) claims fell for the same reasons that the constitutional claims failed. Liability premised on § 1703(b), the court held, "requires proof of action taken with invidious intent . . . ." *Id.* at 373.

In sum, the Second Circuit has imposed enormous obligations and vast liability on state actors based on a statute which has never been interpreted by this Court, a statute that is subject to conflicting interpretations by the circuit courts. The Second Circuit's interpretation is particularly insupportable in view of the unequivocal and express purpose of the statute to limit rather than expand state obligations. Based on the foregoing, the Second Circuit's holding in this case should be reviewed and corrected by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: Albany, New York
April 11, 1997

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Petitioners
The Capitol
Albany, New York 12224
(518) 474-8101

Barbara G. Billet*
Solicitor General

Peter H. Schiff
Deputy Solicitor General

Nancy A. Spiegel
Marion R. Buchbinder
Robert M. Goldfarb
Alicia R. Ouellette
Assistant Attorneys General

**Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1450, 1451—August Term, 1995

(Argued: April 11, 1996

Decided: September 23, 1996)

Docket Nos. 95-6182, 95-6206

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Appellants,

— v.—

CITY OF YONKERS; YONKERS COMMUNITY DEVELOPMENT AGENCY; and U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Samuel Pierce, Secretary,

Defendants,

YONKERS BOARD OF EDUCATION,

Defendant-Appellant,

THE STATE OF NEW YORK; GEORGE E. PATAKI, as Governor of the State of New York; BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; WILLARD A. GENRICH; EMLYN I. GRIFFITH; JORGE L. BATTISTA; LORA BRADLEY CHODOS; LOUISE P. MATTEONI; EDWARD MEYER; FLOYD S. LINTON; SALVADORE SCLAFINI; MIMI LEVIN LIEBER; SHIRLEY C. BROWN; NORMA GLUCK; THOMAS FREY; JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; VINCENT TESE, as Director of the Urban Development Corporation,

Defendants-Appellees.

Before:

KEARSE and ALTIMARI, *Circuit Judges*,
and MORAN, *District Judge**.

Appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, dismissing complaint against State defendants and Urban Development Corporation for actions and omissions contributing to unlawful housing and

* Honorable James B. Moran, of the United States District Court for the Northern District of Illinois, sitting by designation.

school segregation in the City of Yonkers. *See* 880 F. Supp. 212 (1995); 888 F. Supp. 591 (1995). Held: State may not permissibly engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where its acts or omissions are undertaken in response to and in accordance with the segregative wishes of others that were known to be racially motivated.

Vacated and remanded for further proceedings.

MICHAEL H. SUSSMAN, Goshen, New York, *for Plaintiffs-Appellants.*

STEVEN J. ROUTH, Washington, D.C. (Daniel B. Kohrman, Paul A. Minorini, Hogan & Hartson, Washington, D.C., Lawrence W. Thomas, Anderson, Banks, Curran & Donoghue, Mt. Kisco, New York, on the brief), *for Defendant-Appellant.*

MARION R. BUCHBINDER, Assistant Attorney General, New York, New York (Dennis C. Vacco, Attorney General of the State of New York, Victoria A. Graffeo, Solicitor General, Barbara Gott Billet, Deputy Solicitor General, Nancy A. Spiegel, Stephen M. Jacoby, Assistant Attorneys General, New York, New York, on the brief), *for Defendants-Appellees.*

KEARSE, *Circuit Judge*:

Plaintiffs-appellants National Association for the Advancement of Colored People, *et al.* ("NAACP"), and defendant Yonkers Board of Education ("Board of Education" or "Board"), a cross-claimant (collectively "plaintiffs"), appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, dismissing their complaint under 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* ("EEOA"), against defendants The State of New York ("New York State") and various of its officials and agencies, including the Governor and the New York Board of Regents (collectively the "State"), and the New York State Urban Development Corporation and its director (collectively "UDC"). Plaintiffs contended that the housing and school segregation previously found to exist in the City of Yonkers ("Yonkers" or the "City") in violation of the Constitution and federal statutory law, *see* 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), was contributed to by the State and UDC and that those defendants should assist in remedying the vestiges of that segregation. The district court, although finding that the State and UDC had failed to take effective action despite the fact that they knew or should have known of the *de jure* segregation in Yonkers, concluded principally that plaintiffs' complaint must be dismissed on the grounds that their claims were foreclosed by this Court's decision in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), and that the claims against UDC were barred by the statute of limitations. On this appeal,

plaintiffs challenge the court's legal conclusions. For the reasons that follow, we conclude that plaintiffs' claims are not foreclosed by *Arthur v. Nyquist*, and we accordingly vacate the judgment and remand for further proceedings.

I. BACKGROUND

The early history of this litigation and the events leading to it have been explored extensively in prior published opinions of this Court and the district court. The action, charging housing and school segregation in violation of the Equal Protection Clause and various federal civil rights statutes, was commenced by the United States in 1980, was joined by NAACP, and was pursued as a class action against the City, the Board, and the Yonkers Community Development Agency. After a lengthy trial, the district court found those defendants liable for intentional discrimination in housing and education, *see* 624 F. Supp. 1276 (1985) ("*Yonkers I*"), fashioned remedial orders, *see* 635 F. Supp. 1538 and 1577 (1986) ("*Yonkers II*"), and entered judgment accordingly. This Court affirmed the judgment of the district court in all respects. *See* 837 F.2d 1181 (1987) ("*Yonkers III*"), *cert. denied*, 486 U.S. 1055 (1988). Familiarity with those opinions is assumed.

At the time of those decisions, the State and UDC were not parties to the action.

A. *The Addition of the State and UDC as Defendants*

In 1987, NAACP moved to add the State and UDC as parties defendant. The Board, which the district court found had by then, "[a]s a result of [the Board's] good faith and zealous implementation" of the district court's

1986 remedial order, "achieved desegregation of enrollments among the schools," 833 F. Supp. 214, 216 (1993) ("*Yonkers IV*") (internal quotation marks omitted), sought leave to file a cross-claim against the State and UDC. NAACP and the Board alleged that while the Board's implementation of the court's remedial order had had an immediate inter-school desegregative effect, it would not be effective either (a) to eliminate, to the extent practicable, inequalities in the educational program, intra-school segregation, and other vestiges of the prior unlawful segregation in Yonkers, or (b) to maintain desegregation. Plaintiffs contended that the State and UDC had known of the *de jure* segregation in Yonkers; had nonetheless, in response to pressures they knew to be race-related, failed to take effective action to eliminate that segregation and had contributed to it; and should be compelled to assist in eliminating the vestiges of that segregation. After holding the motions in abeyance pending plaintiffs' attempts to obtain the State's consensual assistance, the district court in 1989 granted the motion to add the State and UDC as defendants.

After several unsuccessful attempts by the State and UDC, both in the district court and on appeal, to have the case against them dismissed summarily, the district court held trials on the questions of (a) whether unaddressed vestiges of unlawful segregation continued to exist in the Yonkers schools, and (b) if so, whether and to what extent the State and UDC were liable. In its vestiges decision, rendered after a three-week trial in 1993, the court defined "vestige of segregation" as "a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects," *Yonkers IV*, 833 F. Supp. at 218-19, and found

that vestiges of segregation remained in the Yonkers schools, noting, *inter alia*, "that although minority students in Yonkers attend school in the same buildings as majority students, they are undergoing different educational experiences," *id.* at 225. The court found that compliance with the existing remedial orders would be inadequate to eliminate the vestiges of segregation.

The vestiges decision was not embodied in a final judgment and the State's immediate appeal seeking review of that decision was dismissed. The merits of the vestiges decision are not before us on this appeal.

In 1994, the court held a six-week trial on whether or not the State and UDC should be held liable for Yonkers's unlawful school segregation and its vestiges. Plaintiffs contended, *inter alia*, that those defendants were liable because (1) State education officials knew that *de jure* segregation existed and was increasing in Yonkers schools but took no steps to prevent or remedy that segregation; (2) State education officials failed to implement established New York State policy which required eradication of even *de facto* segregation, and their conduct was motivated by racially-based community and political opposition to that policy; and (3) UDC, though initially proposing scattered-site family-housing construction that would have lessened housing segregation in Yonkers, capitulated to what it knew to be race-based community and City pressure and participated in placing all of its subsidized family-housing projects in the already predominantly minority southwest section of the City, *see, e.g.*, *Yonkers III*, 837 F.2d at 1240-41 (Appendices A and B), thereby exacerbating school segregation. In support of their contentions, plaintiffs presented evidence of, *inter alia*, the knowledge of the State and UDC of segregation and related

inequalities in Yonkers; defendants' knowledge of the motivations of local officials and their constituents in opposing desegregation; and the power of the State to take steps to achieve desegregation, including the authority conferred on its Commissioner of Education ("Commissioner") by N.Y. Educ. Law § 310 (McKinney 1995) to initiate quasi-judicial proceedings *sua sponte* to enforce New York's education policies.

The court received thousands of exhibits and received testimony from more than 30 witnesses, including members and former members of the New York Board of Regents, a former Commissioner, a former Deputy Commissioner, key officials from the State Education Department ("SED"), the former head of UDC, and UDC officials who were responsible for the agency's housing activities in Yonkers. The court also heard testimony from City officials and community leaders who had interacted with the State and UDC on school and housing matters.

Following that trial, the court handed down the two liability opinions at issue on this appeal. In the first, 880 F. Supp. 212 (1995) ("*Yonkers V*"), the court made factual findings that were largely favorable to plaintiffs; but it concluded that the § 1983 claims against the State officials were precluded by *Arthur v. Nyquist*, 573 F.2d 134, and that those against UDC were time-barred. In the second opinion, 888 F. Supp. 591 (1995) ("*Yonkers VI*"), the court concluded that the facts established were insufficient to make the State liable under Title VI or the EEOA.

B. Yonkers V: *Dismissal of the § 1983 Claims*

1. *The District Court's Findings With Regard to Schools*

In *Yonkers V*, the district court considered plaintiffs' claims under § 1983 and made factual findings with regard to the State's knowledge, its power, its conduct, and its motivation.

With respect to knowledge, the court found that there could be no doubt whatever that the State was aware early of the existence of segregation in the Yonkers public schools, and it found that the State knew or reasonably should have known that the segregation was *de jure*. It found that "the State defendants were aware of circumstances that should have alerted them to the likelihood that Yonkers had a substantial problem of unlawful segregation in its schools" and that "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence," *Yonkers V*, 880 F. Supp. at 219, 220; that the State thus had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools," *id.* at 220; that the State indeed had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools," *id.* at 245; and that "SED can fairly be charged with knowing that Yonkers, if left to its own devices, was not going to remedy the segregation voluntarily," *id.* at 219.

> In sum, . . . the State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or

> reasonably should have known that the segregation was *de jure* rather than *de facto*.

Id. at 220.

The court found that the State defendants had the authority to take steps to eliminate the segregation, whether *de jure* or *de facto*, in the Yonkers schools. The court found, *inter alia*, that "New York law has prohibited *de jure* segregation since 1900"; that "[a]s early as 1960, the New York State Board of Regents issued a policy statement urging school districts to take the steps necessary to end *de facto* desegregation in New York's public schools"; that "the Regents reaffirmed that position in a series of subsequent racial integration policy statements"; and that there were numerous statutorily authorized options by which the anti-segregation statute, *see* N.Y. Educ. Law § 3201(1) (McKinney 1995), and the policy statements "could have been enforced by the Commissioner." *Yonkers V*, 880 F. Supp. at 220. The cited options included withholding state financial aid from Yonkers, removing school officials, initiating a proceeding designed to investigate and remedy the segregative conditions, promulgating regulations, and withholding approval of the purchase or building of new school facilities. *See id.* at 220-22. The court concluded that the State "possessed the full means and authority needed to deal with Yonkers school segregation, had it been inclined to do so." *Id.* at 245.

The district court further found that normally "SED is one of the most activist state educational bodies in the country, ... vigorously monitor[ing] and regulat[ing] many different aspects of education, including special education, bilingual education, vocational training, achievement scores, dropout prevention, . . . school

building construction," and school sports safety. *Id.* at 223. Indeed, in other New York communities during the 1960s and early 1970s, State education officials actively attempted to bring an end to the racial imbalance that existed in public schools in those communities. "The SED, under Commissioner Nyquist, did not hesitate to enforce the racial integration policy in connection with § 310 appeals from private citizens," *id.* at 225; and SED sometimes recommended action to correct racial imbalance in schools with respect to which no citizen had ever appealed, *see id.* The court thus found the State's arguments that SED lacked the power to intervene in Yonkers "singularly unpersuasive." *Id.* at 223. It concluded:

> The Court finds that the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so.

Id.

Instead, the State defendants did nothing to remedy school segregation in Yonkers, using none of their powers or authority toward that end. "From the moment in the late 1960's that the State became aware that conditions of racial imbalance were developing in the Yonkers schools, it was in a position to require Yonkers to undertake remedial measures," but "[i]t never took advantage of that position." *Id.*

> Rather than act, the State waited. It waited for private citizens in Yonkers to invoke the State's help by filing § 310 petitions, . . . but no petition was ever filed. It waited for Yonkers to make voluntary efforts to desegregate its schools, and asserts

> that it stood ready with offers of money and technical assistance to aid such efforts. . . . But it never forced the issue. When, for example, the Yonkers education community appeared ready in 1970-71 to take steps to end the segregation in the schools, . . . the SED dispatched staff member Morton Sobel to talk to the local PTA groups. Sobel's message was relatively soft: Yonkers is a segregated district; segregation is not good for children; it is up to you to do something about the condition in your schools. . . . When Yonkers did nothing about the condition in its schools, the State dropped the issue.

Yonkers V, 880 F. Supp. at 223-24. "The State did not, in short, require anything of Yonkers in the area of school desegregation." *Id.* at 223. While proclaiming a willingness to help Yonkers if Yonkers were to choose to desegregate voluntarily, the State decided that "it would not force Yonkers to change." *Id.* at 224.

In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation. While noting that there was no evidence that SED officials affirmatively took steps intending to preserve Yonkers school segregation or to impede Yonkers itself from eliminating it, or that they indicated to anyone in Yonkers that they approved of that segregation or would "look the other way" should Yonkers decide to continue that segregation, and noting that there was no evidence that if a Yonkers citizen had filed a desegregation § 310 petition the Commissioner would not have responded to that petition promptly and fairly, the court found, *inter alia*, that the Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegrega-

tion. For example, in two § 310 proceedings brought by SED Commissioner Nyquist, individual Regents interceded, urging that the Commissioner not enter drastic desegregation orders. Moreover, as a body, the Regents sought to "rein in Nyquist's desegregation efforts, . . . [by] lobb[ying] for legislation providing for stricter judicial review of the Commissioner's § 310 orders." *Yonkers V*, 880 F. Supp. at 226. Further, in 1974, the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force." *Id.* at 225. Finally, in November 1976, the Regents fired Nyquist.

The reasons for the State defendants' actions and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based.

> By 1969, . . . opposition to non-voluntary means to achieve racial integration in the schools—and to racial integration itself—had swelled to the point where *the New York State Legislature enacted* Chapter 342, *a law that prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions.* Although the statute was ultimately declared unconstitutional, as violative of the Equal Protection Clause, . . . *the attitude of the State Legislature was clear.* Indeed, even after Chapter 342 was struck down, the Legislature continued to debate and pass bills and resolutions that were similar to Chapter 342 in their purpose and intended effect. . . .

> *Following the invalidation of Chapter 342, the State took measures that had the cumulative effect of undermining efforts to reduce school segregation.* In 1971, the Legislature eliminated the Racial Balance Fund, which was the source of funding to assist communities in undertaking the expensive task of desegregating their schools, and refused each year thereafter to reinstate the Fund despite annual requests to do so from State education officials. The elimination of the Fund deprived State officials of one of the few positive inducements they had to encourage local acts of desegregation, and thereby weakened their efforts to implement the Regents' racial integration policy. . . .
>
> Changes were also taking place in the composition of the Board of Regents due to the accession to the Board of new Regents, interviewed prior to appointment by legislators (a new practice), who were known to be hostile to vigorous desegregation efforts.

Yonkers V, 880 F. Supp. at 225 (emphases added). In 1974, the State legislature passed a law shortening the Regents' terms of office "in order to make them more 'accountable' to elected officials and their constituents." *Id.* Further, the court found that the Regents, in revising their policy statement on segregation in a way that "diluted [its] pro-desegregation force," were "prodded by criticism of Commissioner Nyquist's vigorous desegregation efforts." *Id.* As for their firing of Nyquist, "[h]is views on [integration] were a substantial factor leading to his discharge." *Id.* at 226.

The district court found that the "determined reluctance" on the part of the State "to enforce its own deseg-

regation policy in Yonkers," *id.* at 224, resulted chiefly from that fact that "race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation." *Id.* at 224-25. "These pressures can only be explained in racial terms." *Id.* at 245. In summary, the district court found that

> the State had the power to act in support of school desegregation in Yonkers, but it lost the will to act. And it lost the will to act for the simple reason that its once touted principles of racial equality in the schools had become politically untenable.

Id. at 227. The court found "that the State's gradual retrenchment from its once strong school desegregation policy, as just outlined, was motivated by a growing antipathy to desegregation on the part of the New York State Legislature." *Id.* at 226.

The district court found that the State's acts and omissions "impacted the City in several ways." *Id.* at 227. The most obvious way was that "Yonkers was not forced to desegregate its schools. There is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions." *Id.* In addition, the State's stance "altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform." *Id.* For example, when SED staff member Morton Sobel visited Yonkers in the early 1970s, bringing PTA groups merely the "tepid" message that segregation is not good for children and that something should be done about it, opponents of desegregation " 'were delighted that they didn't have to deal with the issue [of

desegregation], that it seemed as though it wasn't imperative.' " *Id.* (quoting testimony of Yonkers PTA member (modification in *Yonkers V*)). As another example, in 1975, SED promised $80,000 in funding to a task force authorized by the Board to develop a plan for desegregating the Yonkers schools; but SED proceeded to delay in providing any funding and then ultimately provided only $13,000. SED's conduct hindered the task force's efforts and "enabled opposition to the reform efforts to coalesce to the point where the [Board itself] became hostile to the very desegregation initiative it had originally commissioned." *Id.*

Further, "there was a public perception in Yonkers that Commissioner Nyquist's termination came as a result of his pro-integration stance. This perception added to the widespread belief that the State would not aggressively address the problems in the Yonkers schools or elsewhere in New York. And, whether accurate or not, this belief bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone." *Id.* at 228. Thus, one group, opposing a 1978 desegregation proposal by the then-superintendent of Yonkers schools, urged rejection of that proposal " 'without being intimidate[d] by fear of federal or state agency sanctions' " because

> "[t]he State Department of Education . . . . after going through a period marked by particularly zealous integration directives, is modifying its approach. Last spring, the former commissioner of education Ewald Nyquist, was dismissed because of his single[-]minded pursuit of desegregation throughout the state by busing and other means whether or not warranted. It is now obvious that the

> Board of Regents is taking a more cautions view of integration cases and directives."

Id. at 227-28 (quoting Report of Taxpayers Organization of Northeast Yonkers, dated March 5, 1978, at 4). The State officials and the Board of Regents made "no serious effort" to dispel the public perception, of which they were aware, that the State would not force Yonkers to desegregate, *Yonkers V*, 880 F. Supp. at 228 n.16.

"Thus it occurred that in Yonkers, where local support for desegregation was minimal and no citizen-initiated . . . proceeding was ever commenced, desegregation simply did not take place until it was compelled by order of the federal court." *Id.* at 224.

2. *The District Court's Findings With Regard to Housing*

The district court found that the State also had knowledge that site selection for new subsidized family housing in Yonkers exacerbated segregative conditions both in housing and in the schools. The court found that, like the State, though UDC had the power to take steps to alleviate the housing segregation, UDC failed to do so, and instead worsened segregation by knowingly bowing to political pressure that it knew was race-based.

UDC, "[c]ombining functions, such as housing finance and project development, that were formerly performed by separate entities," "was perhaps the most powerful state housing and development agency ever created." *Yonkers V*, 880 F. Supp. at 228. It had "the unprecedented authority to override local building and land use controls and to exercise powers of eminent domain." *Id.* Nonetheless, though it had these powers and was staffed with "enthusiastic and idealistic persons," who were,

"initially," "dedicated to the creation of fair housing" at sites scattered throughout Yonkers, *id.*, "UDC was soon made aware of strong local opposition to the building of subsidized housing in the predominantly white areas outside of Southwest Yonkers," *id.*, and it capitulated to that opposition while "clearly ha[ving] at least some knowledge that this opposition was race-based," *id.* "[C]onfronted with this race-based community opposition and concerned about the political feasibility of scattered-site housing, [UDC] made a determination not to exercise its statutory override powers, which would have enabled it to proceed without local approval." *Id.* Thus, "between 1969 and 1975 the UDC, regardless of its long-term plans or good intentions, knowingly acquiesced and indeed participated in the segregative site selections." *Id.* at 229. UDC consequently "worsened the already segregated state of housing and schools in the City." *Id.* "[A]t least some SED staff knew during the mid-to-late 1970's that Yonkers was planning to build subsidized housing in a way that would enhance segregation." *Id.* at 244 n.37.

3. ***The District Court's Conclusions of Law***

Notwithstanding the above findings, the district court, "with reluctance," *Yonkers V*, 880 F. Supp. at 245, concluded that plaintiffs' claims against the State officials under § 1983 must be dismissed on the basis of this Court's opinion in *Arthur v. Nyquist*, 573 F.2d 134 ("*Arthur*"). The district court construed *Arthur* to mean that "a state's knowing failure to meet its obligation to eradicate segregation is insufficient to impose liability on the state," *Yonkers V*, 880 F. Supp. at 234; that "more than knowledge of wrongdoing and the power to end it is required before § 1983 liability can be imposed on a state," *id.* at 236; that "state officials cannot be held

liable for their mere inaction or failure to combat the segregative acts of local officials," *id.* at 244; and that, "abdication by the state in discharge of its duty to cause local districts to desegregate does not afford a basis for liability," *id.* at 245. Under this interpretation, the district court ruled that a finding of State liability was foreclosed by *Arthur*:

> [I]t is a close and difficult question whether the issues before this Court are qualitatively different from those dealt with by the Court of Appeals in *Arthur v. Nyquist*. The *Arthur* Court acknowledged the power that resided in the state educational authorities to deal with segregation in Buffalo and accepted the proposition that, "given the chosen policies of the state appellants, it was [not] unforeseeable that the Buffalo schools might remain segregated for an extended period of time." 573 F.2d at 146. But, the *Arthur* Court tells us, more than knowledge of wrongdoing and the power to end it is required before § 1983 liability can be imposed on a state. What else is required? If it can be shown that state and local authorities conspired to thwart state desegregation policies, the result would be different. If it can be shown that state officials gave local authorities *specific* approval, and thereby support, of their unlawful conduct, the result would be different. But the *Arthur* Court searched the record in vain for evidence of such complicity and approval, and we have engaged in a like inquiry, with like results. . . . The closest one approaches to approval is, in our opinion, the determination by the Commissioner and his staff not to recommend to the Legislature that funding proposals for the benefit of local school communities be made contingent

on adoption of desegregation programs. But the reason advanced was a concern that the legislation would fail in its entirety, not a desire to perpetuate segregation.

Indeed, there is no evidence of any affirmative pro-segregative action on the part of the State. The reining in of Commissioner Nyquist and the adoption of less aggressive integration statements over the course of the 1970's are compelling evidence that the State's policy with respect to local segregation grew increasingly passive and reactive, but the policy cannot fairly be categorized as being affirmatively in favor of segregation. State permissiveness and, in truth, state hypocrisy in the face of local segregation are not automatically tantamount to state encouragement and/or authorization of segregation. *See Arthur*, 573 F.2d at 146. That anti-desegregation groups in Yonkers tried to find in the State's permissiveness signs of actual, positive support for their position says something about the political forces at work in Yonkers; but it does not without more transform the State's failure to intervene in Yonkers into affirmative support of school segregation in Yonkers, from a legal standpoint.

. . .

Since we are unable to find, after an exhaustive inquiry, conduct on the part of the State which would satisfactorily distinguish this case from *Arthur v. Nyquist*, and since th[at] case . . . is controlling on this Court, we answer in the negative the question of whether the State may be held liable for knowingly tolerating, *i.e.*, for not proceeding aggressively against, the *de jure* segregation that existed in the Yonkers schools.

Yonkers V, 880 F. Supp. at 236 (emphasis and modification in original).

Thus, although having found (a) that the State had the power to take action against school segregation in Yonkers that it knew or should have known was *de jure*, (b) that that school segregation was perpetuated by the conduct of the State that encouraged the opponents of desegretation, and (c) that the State conducted itself as it did because of pressures it knew to be racially motivated, the court nonetheless concluded that plaintiffs' § 1983 claims must be dismissed because the court believed itself "constrained by the decisional rule set forth in *Arthur*," *Yonkers V*, 880 F. Supp. at 245:

> We reach this conclusion with reluctance for several reasons.
>
> First, we find entirely unpersuasive the argument of the State that it lacked full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools. . . .
>
> We find similarly unpersuasive the State's contention that it lacked the power to address adequately the problem of school segregation. There is no doubt in our mind that the State possessed the full means and authority needed to deal with Yonkers school segregation, had it been inclined to do so. We conclude that the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms.

> However, we find no basis for imposing liability on the State because we find ourselves constrained by the decisional rule set forth in *Arthur v. Nyquist*. As have we, the court in *Arthur* found that the state had the power and duty to address segregation (there, in Buffalo), but nevertheless held that the absence of affirmative participation by the state in local pro-segregative conduct compelled a finding of no-liability. The teaching of *Arthur* is that abdication by the state in discharge of its duty to cause local districts to desegregate does not afford a basis for liability. . . .
>
> In the end, we conclude that the differences between this case and *Arthur* are quantitative, not qualitative. The extent of the State's determination *not* to act vis-a-vis school desegregation in Yonkers and the consequences of that inaction have been fully documented; but no more has been shown.

Yonkers V, 880 F. Supp. at 245 (emphasis in original).

The court reached the same conclusion with respect to the § 1983 claims against the State officials for housing segregation. It concluded that, notwithstanding the fact that the State education officials knew that the City's housing practices were segregative, knew of UDC's participation in the segregative housing site selections, and knew that those site selections exacerbated segregation in the schools, the State's conduct was not actionable under the court's interpretation of *Arthur*. *See Yonkers V*, 880 F. Supp. at 244-45.

As to the claims against UDC, the court found them time-barred. The court found that plaintiffs, who did not seek to make UDC a defendant until 1987, knew or should have known of UDC's role no later than 1975,

and that these claims were therefore barred by the three-year statute of limitations. The court rejected plaintiffs' contention that UDC's failure to remedy the vestiges of unlawful segregation should be viewed as a "continuing wrong," *id.* at 242, reasoning that UDC, whose participation in any housing program in Yonkers ended in 1975, *see id.* at 229, had no "ongoing, pervasive role in matters directly affecting school attendance zoning," *id.* at 243:

> [T]here is no authority for applying a "continuing wrong" theory to the housing defendants here. Although the courts have held some governmental entities to have an affirmative duty to take steps to eliminate the effects of past school segregation and have found a failure to take these steps to be a continuing violation of the affirmative duty, . . . this doctrine seems to have been limited only to defendants with an ongoing, pervasive role in matters directly affecting school attendance zoning. . . . The rationale for finding a continuing wrong by school authorities in these cases is that every assignment by school authorities of a minority student to a minority school is a new discriminatory act. . . . As defendants point out, "[t]here is no evidence, however, that UDC had such power over schools, students, or attendance lines, or assisted the Board in its exercise of such powers.". . . . Therefore, since the UDC's activities in Yonkers took place within a finite time interval and ceased entirely in 1975, this suit, commenced in 1987, cannot be maintained. We accordingly dismiss the claims against the UDC and its present director.

Id. at 242-43.

The district court also ruled that the actions of UDC could not be imputed to the State. It found that UDC, "an entity distinct and separate from the State" with "substantial operational autonomy," is not "an arm or an instrumentality of the State," *id.* at 243; and it stated that there was no evidence that State officials and UDC had worked together in a concerted manner in pursuit of a common segregative goal.

C. Yonkers VI: *Dismissal of the Title VI and EEOA Claims*

In a subsequent opinion, *Yonkers VI*, the district court ruled that the State defendants also were not liable under Title VI or the EEOA.

Influenced by its reading of *Arthur*, the court rejected plaintiffs' claims under Title VI on the ground that the court had not found that the State defendants themselves had engaged in purposeful discrimination. "In this case, acts of intentional racial discrimination have undoubtedly been found, but they have been found only on the part of local Yonkers officials, not on the part of the State defendants." *Yonkers VI*, 888 F. Supp. at 597. Stating that "a state no more 'intentionally' fosters racial segregation by failing to prevent local acts of intentional segregation than it 'intentionally' fosters racial segregation by failing to alter adventitious housing patterns—in other words, it does not unconstitutionally discriminate in either instance," the court concluded that the State's "failure to prevent local acts of segregation, without more," did not violate Title VI. *Yonkers VI*, 888 F. Supp. at 597.

The district court ruled that the application of the EEOA to the State would be inappropriate because the

decade-old court-ordered remedial plan had been entered without findings mandated by that statute. Stating that Congress's intent in enacting the EEOA was to "ensure that courts impose certain vigorous remedies (such as the compulsory transportation of students) only as a last resort, after due and explicit consideration of more moderate alternatives," the court noted that its remedial plan included, "albeit to a minimal degree," mandatory busing which then-parties had assumed was necessary, and that the court had not "made (nor [been] requested to make) specific findings regarding the efficacy of remedies other than busing." *Yonkers VI*, 888 F. Supp. at 595. The court concluded that holding the State liable under the EEOA would make the State a party to a busing order, that that result was inappropriate without the findings required by the EEOA, and that it was too late to reopen proceedings for the consideration of alternative remedial plans:

> We do not think it would be consistent with Congress' intent in adopting the EEOA to require the State to participate in a remedial plan that does not comport with the requirements of a statute applied retroactively to it. Nor do we think it would be sound, from any perspective, to reopen at this late stage in these proceedings questions relating to the proper scope of a remedial plan adopted and implemented a decade ago. Regardless of whether the State can be held vicariously liable as a matter of law under section 204 of the EEOA, we conclude that it cannot lawfully be made to participate in the remedial plan now in place in Yonkers. The State therefore cannot be held accountable under the EEOA in this case.

Yonkers VI, 888 F. Supp. at 595.

The court ordered the entry of a final judgment pursuant to Fed. R. Civ. P. 54(b) reflecting the *Yonkers V* and *Yonkers VI* dismissals of plaintiffs' claims against the State defendants and UDC, and this appeal followed.

II. DISCUSSION

On appeal, plaintiffs contend that they are entitled to a ruling that the State and UDC are liable for the vestiges of school segregation, given the district court's findings of fact. They contend that those findings distinguish the present case from *Arthur v. Nyquist*. The State and UDC contend principally that the district court correctly concluded that plaintiffs' claims against them are precluded by *Arthur*; they make few challenges to the court's factual findings. We have considered all of appellees' arguments on this appeal and conclude that the judgment of the district court cannot stand. For the reasons that follow, we conclude that the district court's findings of fact are supported by the evidence, and that those findings distinguish this case from *Arthur* and warrant the imposition of liability.

A. *The Equal Protection Claims and* Arthur

The fundamental principles governing equal protection claims are well established. They were thoroughly discussed in *Yonkers III*, 837 F.2d at 1216-18, 1221-27, and do not require extended discussion here. A plaintiff is required to show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) ("*Arlington Heights I*"); *Keyes v. School Dis-*

trict No. 1, 413 U.S. 189, 198 (1973). *See generally Washington v. Davis*, 426 U.S. 229, 239 (1976). The plaintiff need not show, however, that a government decisionmaker was motivated solely, primarily, or even predominantly by concerns that were racial, for

> "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."

Arlington Heights I, 429 U.S. at 265 (footnote omitted). Rather, the plaintiff need begin only by showing that race was "*a* motivating factor." *Id.* at 266 (emphasis added). Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show that the same result would have been reached even without consideration of race. *Id.* at 270 n.21; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). If the defendant comes forward with no such proof or if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established.

Yonkers III, 837 F.2d at 1217. *See also Arthur*, 573 F.2d at 142 ("A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies." (internal quotation marks omitted)).

The requisite intent element may be established in a number of ways. "The foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." *Yonkers III*, 837 F.2d at 1227 (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 (1979) (other internal quotation marks and modification omitted)); *see also Hart v. Community School Board of Education*, 512 F.2d 37, 46-48, 51 (2d Cir. 1975); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 183-84 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Other probative sources may include "[d]epartures from the normal procedural sequence," *Arlington Heights I*, 429 U.S. at 267, "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," *id.*, and patterns of official appointments that fill key positions with persons who are likely to maintain a segregated status quo, *see Yonkers III*, 837 F.2d at 1235.

In *Yonkers III*, we concluded that the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated:

> Even assuming . . . that the actions of the municipal officials are only responsive rather than leading the fight against desegregation, we conclude that the Equal Protection Clause does not permit such actions where racial animus is a significant factor in the community position to which the city is responding. . . .

Id. at 1224 (citing, *inter alia*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). We noted that

> [t]he Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens. . . . [In *Palmore v. Sidoti*], the Court stated as follows: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.' " 466 U.S. at 433 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

Yonkers III, 837 F.2d at 1224. We cited with approval cases such as *Smith v. Town of Clarkton*, 682 F.2d 1055, 1063-66 (4th Cir. 1982), in which

> a town was found liable under the Equal Protection Clause [*inter alia*] for withdrawing from a joint plan to construct low-income housing, where its withdrawal was a response to town residents' opposition that was "motivated in significant part by racial considerations." 682 F.2d at 1063 . . . . *Though there was no evidence that the town officials themselves had a history of racially discriminatory acts or that in their individual capacities they were racially motivated*, the circuit court upheld the imposition of liability, stating that "[i]t is not necessary, in proving a violation of the equal protection clause, to show that the challenged actions rested

> *solely* on a racially-discriminatory intent in order to demonstrate that the involved officials acted with an intent to illegally discriminate," *id.* at 1066 (emphasis in original), and concluding that *there could be "no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition*," *id.*

Yonkers III, 837 F.2d at 1225 (emphases added except as indicated). We concluded that

> [i]t is sufficient to sustain a racial discrimination claim if it has been found, and there is evidence to support the finding, that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive.

Id. at 1226; *see also id.* ("City may properly be held liable for the segregative effects of a decision to cater to [the race-based] 'will of the people' "); *id.* at 1234 ("To the extent that the Board was being responsive to the wishes of segments of the community and the [City] Council, the imposition of liability on the Board was proper since the opposition to desegregative steps was racially motivated.").

Liability may be premised not only on action but on a refusal to act. *See, e.g., Arthur*, 573 F.2d at 141 (a finding of *de jure* segregation may be based on acts of commission or omission by governmental bodies which have the " 'natural and foreseeable consequence of causing educational segregation' " (quoting *Hart v. Community School Board of Education*, 512 F.2d at 50)). Thus, "[g]overnment officials may be held liable under § 1983 for a failure to do what is required." *Doe v. New York*

City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983). *See also Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977) ("[w]here conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction"). Further, in *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994), we considered a claim that the commissioner of New York's Division of Housing and Community Renewal had improperly failed to use his authority to intervene in a municipal housing authority's operations to assure protection of state and federal civil rights. We observed *obiter* that "[i]f [the commissioner] did have authority to intervene, and he knew about the discriminatory practices in the tenant selection process, then he could be liable under 42 U.S.C. § 1983." *Comer v. Cisneros*, 37 F.3d at 804. Even if an official had no statutory duty to act, he may be liable if his refusal to act was a response to pressures that were known to be racially motivated. *See, e.g., Yonkers III*, 837 F.2d at 1218-19 (where site restrictions on low-income housing were imposed in response to pressures known to be racially motivated, the fact that the City had no duty to provide low-income housing was not significant); *see also LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (housing restrictions with religious motivation), *cert. denied*, 116 S. Ct. 2546 (1996).

These principles govern the present case, for though the district court stated that it did not find that the State officials and UDC themselves performed affirmative acts of intentional discrimination, it found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*,

had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated. In detail, the district court found, *inter alia*, that

> - the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"

Yonkers V, 880 F. Supp. at 219, 220;

> - the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"

id. at 220;

> - the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"

id. at 245;

> - the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily,"

id. at 219, 220. The court also found, *inter alia*,

> - that in other communities, Commissioner Nyquist had "not hesitate[d] to enforce the [New York] racial integration policy,"

id. at 225;

> - that the legislature responded to Nyquist's desegregation efforts with a statute that "prohibited

State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions,"

id.;

- that, after that statute was declared unconstitutional, the legislature took other actions whose "purpose and intended effect" were "similar" and "had the cumulative effect of undermining efforts to reduce school segregation,"

id.;

- that the legislature also adopted "a new practice" of having candidates for the Board of Regents be "interviewed prior to appointment by legislators . . . who were known to be hostile to vigorous desegregation efforts,"

id.;

- that the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force,"

id.;

- that this revision was a response to "criticism of Commissioner Nyquist's vigorous desegregation efforts,"

id.;

- that the Board of Regents lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders in an effort to "rein in Nyquist's desegregation efforts,"

id. at 226; and

> - that the Board of Regents finally simply fired Nyquist; "[h]is views on [integration] were a substantial factor leading to his discharge,"

id.

Thus, the district court found that the State had exhibited a "determined reluctance to enforce its own desegregation policy in Yonkers," *id.* at 224; that the State decided that "it would not force Yonkers to change," *id.*; and that that determined reluctance was a knowing response to increasing "opposition . . . to racial integration," *id.* at 225. In sum,

> the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms.

Id. at 245.

Of these findings, the State has challenged only the finding that the State defendants knew or reasonably should have known that the segregation in Yonkers was *de jure* rather than *de facto*. We reject this challenge. The evidence before the district court included many SED documents and the testimony of several former SED officials, including Sobel, whose title was "Specialist in Educational Integration" and whose primary function related to racial imbalance and desegregation activities in local school districts. Documentary evidence revealed that SED had begun collecting annual statistics in 1966 with regard to the racial makeup of each school district as a whole and of each school within the district. Sobel, who joined SED in 1968, testified,

"We had figures which were reported by every school district annually, including racial breakdown of student body and professional staff and so on." (Deposition of Sobel at 176.) With respect to Yonkers, Sobel said, "[A]ll I had to do was to look at the numbers and see that there was racial imbalance existing." (*Id.*)

Sobel visited the schools in Yonkers and was aware that the predominantly minority schools tended to have worse physical plants, less recreation space, and more minority teachers, who tended to be less experienced than the teachers at predominantly white schools. (*See id.* at 257-58.) He testified, "I was in a district that was not integrated" (*id.* at 258-59), and that the minority schools were inferior.

SED also received letters and telephone calls from Yonkers residents "complain[ing] about predominantly or all minority schools." (*Id.* at 179.) Sobel testified, "we also had the figures so we knew what the situation was." (*Id.* at 178.) In 1968, for example, an SED official wrote to a Yonkers resident offering reassurance that SED was "working toward a reduction of racial imbalance" in the Yonkers schools. (Letter of Wilbur R. Nordos, assistant to SED Commissioner Allen, to Ruth Love, dated February 27, 1968.)

In early 1970, Nyquist wrote to the Yonkers Board of Education, pointing out that the October 1969 school racial census revealed that "your school district has a district-wide average of 13.1% minority group students. It further shows that of the 40 schools, 24 are at 10% or greater variance from the district-wide average, the greatest variance being 65% or more." (Letter of Commissioner Nyquist to President of the Yonkers Board of

Education at 1.) Nyquist asked the Board to respond by July 1970 with proposals for desegregation.

Though there was an initial brief response to Nyquist's letter, the Yonkers school superintendent died in September 1970, and Sobel thereafter viewed it as highly unlikely that the Board would proceed with any steps toward desegregation voluntarily. His view was not based on conjecture or surmise. School administrators told Sobel that there was community opposition to desegregation of the schools in Yonkers (*see* Deposition of Sobel at 259), and the acting superintendent told Sobel explicitly "that he [the acting superintendent] was not going to do anything. He said that very clearly" (*id.* at 122). One of the reasons stated by the acting superintendent for declining to take any action was that "if he [the acting superintendent] did move ahead in the area of desegregation, since he was a candidate for the superintendency it was his feeling that community resistance might impede his candidacy." (*Id.* at 122-23.) There was "absolutely[ ] no question" in Sobel's mind that the acting superintendent was correct, that if he took steps toward desegregation he "would encounter vocal opposition." (*Id.* at 126-27.)

Though often the local opposition to any SED offer of help was stated in terms of opposition to busing, Sobel testified that, in his experience, a stated "opposition to busing was a smoke screen for their opposition to racial integration . . . . [T]hose who opposed busing for desegregation purposes used that to support their opposition to racial integration. I never heard any of those people object to transporting children for other reasons." (*Id.* at 84.) Sobel's view was amply supported by, *inter alia*, the evidence presented at the first trial in this litigation; in *Yonkers III*, we noted that any suggestion that

"popular opposition to desegregative proposals was merely an opposition to busing, not to desegregation," was "entirely frivolous," 837 F.2d at 1231, given the fact that "[h]ostile white audiences from at least the early 1970's . . . told state and local school officials *in haec verba* that they did not want their children going to school with minority children," *id.* In light of the local opposition to desegregation, Sobel "was convinced that Yonkers was not going to move forward on its own" (Deposition of Sobel at 306), and he expected that it would not ask SED for help. His expectations were borne out. It was Sobel's view from September 1970 until he left SED in 1980, that Yonkers school officials were in default on their responsibilities to carry out the educational policies of New York State with respect to racial imbalance (*see id.* at 354-55), "that . . . Yonkers had serious problems with racial imbalance" (*id.* at 304), and "that the racial imbalance in Yonkers was getting worse" (*id.* at 292). By January 1976, data collected and analyzed by SED made it "evident that Yonkers was one of the most segregated school districts in the State of New York." (Deposition of former SED official Stanley C. Campbell at 72).

In sum, the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*.

Further, there was ample support, and the State defendants do not appear to contend otherwise, for the court's finding that the failure of the SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of

heavy pressure from the New York State legislature. Sobel testified, for example, that the perception in SED was that the New York Senate majority leader, who represented Niagara Falls, expressed doubts about continuing the legislative appropriation for SED's "Racial Balance Fund," which was used to help districts desegregate, because the majority leader opposed SED's racial balance plan for Niagara Falls. SED officials' view was that the senator "might decide to punish us" in order to curry favor with his constituents. (Deposition of Sobel at 383.) The legislature did thereafter stop making Racial Balance Fund appropriations.

The evidence also included the testimony of former Regent Theodore M. Black that in the early 1970s, state legislators took several steps to control the Board of Regents' efforts toward desegregation. Realizing that Nyquist served at the pleasure of the Board of Regents without a contract, the legislative leadership intensified its efforts to accelerate changes in that board's membership, shortening the Regents' term of office from 15 years to seven. Further, in about 1973, individual legislators began to interview candidates for Regent positions and in the interviews discussed the subject of busing; at least one Regent whose term was about to expire was very much in favor of busing, and he was not reappointed; an on-the-record opponent of busing was appointed instead. Black testified:

> It was not difficult to divine what the legislature was up to. They kept up the pressure on the Regents for two reasons: to hasten abandonment of the Regents['] pro-busing policy, and to hasten the dismissal of the commissioner who was blamed for it.

(Deposition of Black at 100.)

The legislature also cut SED appropriations. As Black characterized it, "If the Regents wouldn't give . . . Nyquist the sack, then the legislators would use their favorite weapon, money, to hack his top staff to pieces. It was a cruel time." (*Id.* at 132.)

Former Regent Kenneth Clark testified similarly that

> in the '70s, middle or late '70s, it became more and more clear that the legislature was moving toward restricting the activities of the Regents and the State Education Department in the area of desegregation of schools. Very strong and clear signals started to come that the legislature, probably responding to their clients [*sic*], were against busing, were against a continued aggressive approach to desegregation on the part of the Board of Regents.

(Deposition of Clark at 14.) He elaborated that

> the most obvious [signal] was that the legislature, in seeking to determine who would or would not be elected to the Board, would have interviews with prospective members or with those members of the Board of Regents whose term had come up and who were to be re-elected; that the interviews seemed clearly related to the litmus test of determining whether the prospective regent or the regent to be re-elected was or was not supportive of the legislature's position on anti-busing and desegregation. This was clear. And there was no question that the legislature was becoming more and more aggressive in blocking the school integration that was being pursued earlier by the Board of Regents.
>
> . . . .

> . . . [E]veryone knew . . . that the legislature, in exercising its power to select Regents, was also at the same time sending the signal that the Commissioner of Education at the time, Ewald Nyquist, was to be restrained in his powers as far as integration is concerned.

(*Id.* at 14-15, 22-23.)

The district court's amply supported factual findings distinguish the present case from *Arthur v. Nyquist* in at least two critical respects. First, with respect to Buffalo, the state officials took numerous steps in an attempt to have that city develop an effective desegregation plan. When the Commissioner found that *de facto* segregation existed in Buffalo, he ordered that city's board of education to submit a desegregation plan within three months; when he found the submitted plan to be inadequate, he rejected it and required a new plan; he appointed an advisory committee to help develop a satisfactory plan; when a satisfactory plan was eventually submitted, he approved it and ordered periodic reports on its implementation. When the approved plan was thwarted by the Buffalo city council's refusal to appropriate funds for it, the Commissioner, *inter alia*, ordered the school board to submit a new desegregation plan, and he sent members of his staff to Buffalo to work with the board. When all of those efforts failed, the Commissioner issued a show-cause order to the Buffalo board, threatening to exercise his statutory enforcement powers. Second, although we noted in *Arthur* that the state officials could have taken more drastic action, and that absent such action it was "[n]o[t] . . . unforeseeable that the Buffalo schools might remain segregated for an extended period of time," 573 F.2d at 146, we concluded that the state officials had rebutted any inference of seg-

regative intent arising from that foreseeability because they showed "legitimate policy considerations [that] warranted" their decision not to use more drastic remedies, presenting legitimate bases for viewing harsher measures as "inappropriate under the circumstances," *id.* We concluded that there was insufficient evidence in *Arthur* that the state officials abdicated their duties to attempt to achieve desegregation.

In sum, in *Arthur* there was evidence (a) that the state officials made substantial, repeated efforts to require Buffalo to develop and implement a desegregation plan, and (b) that the state officials' decision not to use more drastic measures was the result of legitimate considerations rather than of their capitulation to views they knew to be racially motivated. Thus, the evidence in *Arthur* as to SED's conduct and motivation with respect to Buffalo was materially different from the evidence in the present case with respect to Yonkers. *Arthur* did not warrant dismissal of the claims against the State for its conduct with respect to Yonkers.

Further, although the district court concluded in the present case that there was no evidence that SED officials ever gave "*specific* approval" to segregation in Yonkers, *Yonkers V*, 880 F. Supp. at 236 (emphasis in original), or intentionally took any "affirmative pro-segregative action," *id.*, and no evidence that the Board of Regents "was affirmatively in favor of segregation," *id.*, those conclusions are, in the circumstances here, not dispositive. The court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated. This conduct falls squarely within the principles enunciated in *Yonkers III*, *see*, *e.g.*,

837 F.2d at 1224-26, 1232. Government officials, whether city or state, are not permitted to engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where their acts or omissions are undertaken in response to and in accordance with the segregative wishes of others that are known to be racially motivated. Thus, though the district court posited that "a state's knowing failure to meet its obligation to eradicate segregation is insufficient to impose liability on the state," *Yonkers V*, 880 F. Supp. at 234, that statement is elliptical. It is not correct where the failure was the result of a knowing capitulation to racially inspired pressures rather than of any legitimate reasons. In the present case, the district court found no legitimate reasons.

The State defendants contend, however, that the judgment in their favor should be upheld on the basis that, under New York law, they lacked legal authority or responsibility to intervene in Yonkers to remedy the unlawful segregation. In light of the express provisions of New York statutory law, this contention need not detain us long.

Under the New York Education Law, SED, with the Board of Regents as its "head," and the Commissioner as its "chief administrative officer," is "charged with the general management and supervision of all public schools." N.Y. Educ. Law § 101; *see also id.* § 305(2) (Commissioner has "general supervision over all schools"). At all times pertinent to this litigation, the statute has provided that "*[n]o person shall be refused admission into or be excluded from any public school in the state of New York on account of race . . . .*" *Id.* § 3201(1) (emphasis added).

The statute provides that the Commissioner "*shall* enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents," *id.* § 305(1) (emphasis added); and it provides that he "*shall also have the power* and *it shall be his duty* to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city," *id.* § 308 (emphases added). *See also Arthur*, 573 F.2d at 146; *New York City School Boards Association v. Board of Education of the City School District of the City of New York*, 39 N.Y.2d 111, 116, 383 N.Y.S.2d 208, 211 (1976); *Vetere v. Allen*, 15 N.Y.2d 259, 267, 258 N.Y.S.2d 77, 80 (per curiam), *cert. denied*, 382 U.S. 825 (1965). In *Vetere*, the New York Court of Appeals noted that where the Commissioner and the Board of Regents find that racial imbalance in the schools of a given community has made the schools educationally inadequate, the Commissioner has virtually unreviewable authority under the Education Law to order student transfers in order to eliminate the imbalance.

Further, as the district court observed in the present case, the statute also gives the Commissioner various explicit powers that he may use in order to carry out his duty to enforce state educational laws and policies. *See, e.g.*, N.Y. Educ. Law § 306(2) (he may withhold state financial aid from any school district for willfully disobeying any law or order); *id.* § 310 (he may institute quasi-judicial proceedings); *id.* § 408 (he may withhold approval of purchase or building of new school facili-

ties); *id.* § 306(1) (he may remove school board officials).

Given the statute's clear impositions of duty and grants of power, the State defendants' twin disclaimers of responsibility and authority are meritless.

In sum, in *Yonkers III*, we were left with no doubt that the City and Board officials knew of the racial animus motivating most of the opposition to school or housing desegregation in Yonkers. On the present appeal, in light of the record supporting the findings made in *Yonkers V*, there is also no doubt (1) that SED officials (a) were aware that citizen opposition to desegregation in Yonkers was motivated by racial animus, (b) were aware that the local officials would take no action to achieve desegregation voluntarily, and (c) were aware that the refusals of City and Board officials to take action toward desegregation were designed to placate that racial animus; and (2) that the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials.

As we said in *Yonkers III*, public officials may not, with impunity, give effect to private biases, either directly or indirectly. We conclude that, given the district court's amply supported findings of fact, the defendant State officials may properly be held liable under § 1983 on plaintiffs' claims for prospective injunctive relief to remedy vestiges of school segregation in Yonkers.

B. ***The EEOA Claims***

To the extent that plaintiffs' claims were asserted against New York State, SED, and the Board of Regents, (collectively the "State institutional defendants"), the claims properly were not upheld under § 1983, for those defendants have Eleventh Amendment immunity and hence are not considered to be persons suable under § 1983. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). *But see Hafer v. Melo*, 502 U.S. 21, 27 (1991) (an individual state official sued in his or her official capacity for injunctive relief is a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State" (internal quotation marks omitted)); *Will v. Michigan Dept. of State Police*, 491 U.S. at 71 n.10 (same). Nonetheless, plaintiffs were entitled to prevail against the State institutional defendants under the EEOA, which contains prohibitions directed expressly against the states and their agencies.

The EEOA (or the "Act") provides that "*[n]o State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 (emphasis added). Further, the Act forbids the state to perpetrate such a denial through various acts or omissions of an "educational agency." *See id.* §§ 1703(a)-(f). The Act defines "educational agency" as "a local educational agency *or* a '*State* educational agency.' " *Id.* § 1720(a) (emphasis added); *see also Idaho Migrant Council v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981) (educational agency as used in EEOA includes a "state board of education"). It provides that the state may be held liable for, *inter alia*,

> (c) *the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides*, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;
>
> (d) *discrimination by an educational agency* on the basis of race, color, or national origin *in the employment, employment conditions, or assignment to schools of its faculty or staff* . . . .

20 U.S.C. §§ 1703(c) and (d) (emphases added).

The legislative history of the EEOA "is very sparse, indeed almost non-existent." *Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981). The Act itself, however, in providing explicitly that "[n]o State" shall engage in the prohibited conduct and in including within the prohibition acts by "State educational agenc[ies]," obviously reflects Congress's intention to hold the states and their agencies liable. We thus view the EEOA as expressly abrogating the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA. *Accord Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1038 (7th Cir. 1987) ("the EEOA expressly contemplates that relief is to be obtained from the state and its agencies"); *Board of Education of Peoria, School District No. 150 v. Illinois State Board of Education*, 810 F.2d 707, 712 (7th Cir.) (EEOA

"requires that the *state* ensure compliance" (emphasis in original)), *cert. denied*, 484 U.S. 829 (1987).

As a substantive matter, the EEOA provides protections similar to those provided by the Equal Protection Clause. In enacting the EEOA, Congress

> declare[d] it to be the policy of the United States that-
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) the neighborhood is the appropriate basis for determining public school assignments.

20 U.S.C. § 1701(a). Congress's purpose was to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." *Id.* § 1701(b). Thus, the Act provides substantive protections that "considerabl[y] overlap . . . those provided under the fourteenth amendment," *United States v. School District of Ferndale, Michigan*, 577 F.2d 1339, 1346 (6th Cir. 1978); *see also Castaneda v. Pickard*, 648 F.2d at 1001 ("the elements of plaintiff's cause of action for discrimination in the hiring and promotion of teachers and administrators under the [EEOA] are the same as the elements of their claims premised on the fourteenth amendment and § 1983"); *United States v. Hinds County School Board*, 560 F.2d 619, 623 (5th Cir. 1977) (rights conferred by EEOA go beyond those provided by the Fourteenth Amendment).

The EEOA also imposes on states the obligation to enforce the equal-educational-opportunity obligations of local educational agencies. *See, e.g., Idaho Migrant Council v. Board of Education*, 647 F.2d at 71 (state's

department of education, board of education, and superintendent of public instruction have "an obligation to supervise the local districts to ensure compliance"). In *United States v. School District of Ferndale, Michigan*, for example, the government alleged, *inter alia*, that

> [t]he State defendants, notwithstanding their knowledge that the Ferndale elementary schools were being operated by defendant local school authorities on a racially segregated and discriminatory basis, have nevertheless continued to aid and assist the perpetuation and maintenance of that racial segregation and discrimination through the provisions of state funds and other assistance, while failing and refusing to take any necessary or appropriate action to bring the operation of the Ferndale elementary schools into compliance with the Fourteenth Amendment to the United States Constitution.

577 F.2d at 1347. The district court in that case "apparently felt that the [EEOA] applied only to direct acts of discrimination, not to indirect assistance to districts violating the Act," and dismissed the EEOA claims against the state on the ground that "it was not the 'educational agency' that allegedly committed the proscribed discriminatory acts." *Id.* (footnote omitted). The Sixth Circuit reversed, stating that a proper EEOA claim is stated by the allegation that the state "*tolerated and provided assistance to a local school district which [it] knew to be engaging* in" the "discriminatory assignment of students and teachers," *id.*:

> *We do not believe that the State can escape liability under the Act merely because its support for the proscribed actions was indirect.* This Court has previously noted the substantial control exerted by

> Michigan state officials over local school operations. . . . In another Michigan desegregation case, we expressly ruled that state officials could be held jointly responsible with local authorities for segregated conditions in local schools, where the state officials had shown "consistent inaction in preventing increased segregation" and had consistently provided funding and other assistance to the local district. . . . Although that claim arose under the fourteenth amendment, *we think the principle of joint liability is applicable here as well. Congress plainly intended that the practices listed in § 1703 be ended. Such a goal can only be subverted by allowing states to knowingly support the prohibited practices with impunity.* This is particularly true where state assistance forms a sizable part of the local school district's budget. We seriously doubt that Congress intended to allow states to bankroll dual school systems, while enacting a statute specifying remedies for the *elimination* of such systems.

Id. at 1347-48 (footnotes omitted; last emphasis in original).

We agree, and, given the discussion in Part II.A. above, we find these principles squarely applicable to the conduct of the State institutional defendants with respect to Yonkers. The district court in the present case correctly stated that "the literal and unambiguous language of section 1703 . . . seem[s] to impose on states . . . supervisory liability." *Yonkers VI*, 888 F. Supp. at 594 (citing *Yonkers V*, 880 F. Supp. at 239-41); *see also Yonkers V*, 880 F. Supp. at 239 ("if one were to set about to write a statute in a way that provided for vicarious state liability, one could not find language that was more clear and direct than that contained in § 1703 of the

EEOA"). But the court believed that "supervisory" liability for the known acts of local and state entities was foreclosed by *Arthur*. It expressed the view that "Congress did not intend the statute to afford protections against racial discrimination beyond those already provided under the Fifth and Fourteenth Amendments of the Constitution," and that thus the EEOA should not be construed to impose on the states the very same "type of supervisory liability" that the court had found to be "foreclosed under 42 U.S.C. § 1983" by reason of *Arthur*. *Yonkers VI*, 888 F. Supp. at 594; *see also Yonkers V*, 880 F. Supp. at 240 ("the language of the EEOA on its face appears to impose on the states the very type of supervisory liability for the conduct of local actors that the *Arthur* decision foreclosed"). For the reasons stated in Part II.A. above, we have rejected the district court's view of *Arthur* with respect to the scope of the constitutional provisions; for the same reasons, we reject its view that the scope of the EEOA is similarly circumscribed. Plaintiffs' claims against the State, SED, and the Board of Regents under the EEOA should have been upheld.

The district court also noted that were it to uphold plaintiffs' claims under the EEOA, it would be required to revisit the question of the appropriate remedy for such a violation. The court correctly noted that the EEOA requires the court to make specific findings as to whether a denial of equal educational opportunity may be remedied by a method or combination of methods that does not include busing. However, the Act merely prioritizes methods, and does not eliminate busing. The Act itself states that while the EEOA is meant to "specify appropriate remedies for the elimination of the vestiges of dual school systems," 20 U.S.C. § 1702(b), its pro-

visions "are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States," *id.* Thus, while the EEOA "manifests a purpose . . . to guide and channel" judicial power, it is not to be construed to "restrict the breadth of discretion of th[e] court to determine what scope of remedy is constitutionally required." *Morgan v. Kerrigan*, 530 F.2d 401, 413 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *see also Brinkman v. Gilligan*, 518 F.2d 853, 856 (6th Cir.) (construing the EEOA "as not limiting either the nature or the scope of the remedy for constitutional violations"), *cert. denied*, 423 U.S. 1000 (1975).

Though in fashioning its remedial order at the outset the district court had not made the findings required for an order under the EEOA, it should make such findings on remand with respect to any remedial order to be fashioned and imposed on the State and its agencies.

C. ***Title VI***

In light of our conclusions that the defendant State officials may be held liable under § 1983 and that the State, SED, and the Board of Regents may be held liable under the EEOA, we need not address plaintiffs' challenges to the district court's rejection of their claims under Title VI.

D. ***The Claims With Respect to Housing and UDC***

The rejection of plaintiffs' claims against the State with respect to the segregative placement of new subsidized family housing, and that placement's effect of perpetuating and exacerbating segregation in the Yonkers schools, was premised on the district court's view that

the present case was not meaningfully distinguishable from *Arthur*. The district court should reconsider its dismissal of these claims in light of our discussion in Part II.A. above.

Likewise, the district court's ruling that the claims against UDC are barred by the statute of limitations should be reconsidered within the framework of our discussion in Parts II.A. and B. The cornerstone of the district court's analysis of whether the claims against UDC were timely, on the theory that UDC might be held liable for a "continuing wrong," was the court's view of the substantive extent of UDC's liability. The court began with the proposition that a duty to take steps to eliminate the effects of past school segregation will be imposed on a governmental entity only if it had a "*pervasive* role in matters *directly* affecting school attendance zoning," *Yonkers V*, 880 F. Supp. at 243 (emphases added), and it found that UDC had no direct or pervasive role. This view of the substantive extent of a governmental entity's liability was consistent with the district court's interpretation of *Arthur*.

As discussed above, however, a public entity may be held liable for the discriminatory effects of its knowing action or inaction in capitulation to the wishes of others that are known to be racially motivated; its role need not be direct or pervasive; it may be liable even if its conduct furthers the racially inspired goals only indirectly. Further, in the context of unlawful school segregation, state agencies or officials whose actions have contributed to that segregation have a duty "to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.' " *Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1,

15 (1971)). "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education v. Penick*, 443 U.S. at 459.

The district court's findings in the present case leave no doubt that UDC played a role in the perpetuation of school segregation in Yonkers. As the district court noted, there was a "close interrelationship between school segregation and segregative housing patterns in Yonkers, each affecting and aggravating the other." *Yonkers V*, 880 F. Supp. at 241; *accord Yonkers III*, 837 F.2d at 1234-35. The court found that UDC "worsened the already segregated state of housing and schools in the City" by its "knowing[ ] acquiesce[nce] and indeed participat[ion] in the segregative site selections." *Yonkers V*, 880 F. Supp. at 229. Thus, the perpetuation and exacerbation of segregated housing through UDC's participation in the placement of low-income housing only in heavily minority neighborhoods has had long-term segregative effects on the schools. These effects were easily foreseeable. SED officials were generally "very much aware of the problems" and had internal discussions "about the effect of publicly subsidized housing on racial imbalance in the schools" (Campbell Deposition at 62, 61); and they were aware "[t]hat Yonkers was going to build subsidized housing which would enhance segregation" (Sobel Deposition at 223). A City advisory group "relay[e]d concerns about racial imbalance in . . . schools in Yonkers to the UDC employees" (Trial Transcript at 710-11 (testimony of Yonkers Community Advisory Council member)); and the Yonkers City Manager testified that UDC's housing activity was reviewed by him and the Board of Education and that "all th[e] information" as to housing place-

ment's "consequences on school enrollment" was "share[d] . . . with the UDC" (*id.* at 662). UDC did not persuade the district court that it had any legitimate reason for its acquiescence in segregative housing placements; the only reason found by the court was UDC's "aware[ness] of strong local opposition to the building of subsidized housing in the predominantly white areas," *Yonkers V*, 880 F. Supp. at 228.

Despite the evidence and the findings, it is unclear that the district court, in light of its view of *Arthur*, would have concluded, leaving aside any statute-of-limitations defense, that UDC had any liability whatever with respect to school segregation because the court found that UDC's role was not pervasive or direct. And it is unclear whether, in concluding that there was no "continuing" liability for purposes of the statute of limitations, the court's view of the temporal extent of UDC's liability was independent of its unduly restrictive view of the potential substantive extent of that liability. In sum, the court apparently viewed UDC as having committed no actionable wrong, and that view, which we have rejected, may well have affected the court's assessment of the degree to which the wrong could be deemed a "continuing" wrong.

We conclude that, in light of our rejection of the court's conclusion that governmental actors could not be held liable on the basis of the facts established here, it is appropriate for the district court, in the first instance, to reconsider its view of the duration of UDC's liability.

CONCLUSION

For the reasons discussed above, the judgment of the district court dismissing the claims against the State defendants and UDC is vacated, and the matter is remanded for further proceedings not inconsistent with the foregoing.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)
March 27, 1995
HONORABLE LEONARD B. SAND, U.S.D.J.

UNITED STATES OF AMERICA,

Plaintiff,

—and—

YONKERS BRANCH, NAACP, et. al.,

Plaintiff-Intervenors,

—against—

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY, YONKERS BOARD OF EDUCATION,

Defendants,

—and—

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

—and—

THE STATE OF NEW YORK; MARIO CUOMO, as GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L.

BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

APPEARANCES:

MICHAEL H. SUSSMAN, ESQ.
Attorney for Plaintiff-Intervenors NAACP
25 Main Street
Goshen, N.Y. 10924

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for New York State Defendants
120 Broadway
New York, N.Y. 10271
HARVEY J. GOLUBOCK, ESQ.
HOWARD L. ZWICKEL, ESQ.
MARION R. BUCHBINDER, ESQ.
STEPHEN JACOBY, ESQ.
—Of Counsel—

HOGAN & HARTSON
Attorneys for Yonkers Board of Education of the City of Yonkers
555 13th Street, N.W.
Washington, D.C. 20004-1109
STEVEN J. ROUTH, ESQ.
DANIEL B. KOHRMAN, ESQ.
PAUL A. MINORINI, ESQ.
—Of Counsel—

—and—

ANDERSON BANKS MOORE CURRAN & HOLLIS
61 Smith Avenue, P.O. Box 240
Mt. Kisco, N.Y. 10549
LAWRENCE W. THOMAS, ESQ.
—Of Counsel—

WHITESIDE & FITZPATRICK
Attorneys for CITY OF YONKERS
1929 Third Avenue
North Birmingham, Alabama 35203
RAYMOND P. FITZPATRICK, JR., ESQ.
DAVID P. WHITESIDE, ESQ.
—Of Counsel—

OPINION

SAND, J.

In response to the efforts of the Yonkers Board of Education ("YBE") and the Yonkers Branch, NAACP (collectively, "plaintiffs") to add as defendants the State of New York, the State Board of Regents, and various other State education officials (collectively, "the State"), as well as the Urban Development Corporation ("UDC") and its director, this Court has held a number of hearings and issued several opinions, familiarity with which we assume herein. *See United States v. Yonkers*, 833 F.Supp. 214 (S.D.N.Y. 1993) (holding that vestiges of segregation persist in the Yonkers Public School System); *United States v. Yonkers*, No. 80 Civ. 6761, 1992 WL 176953 (S.D.N.Y. July 10, 1992) (denying the State's motion for summary judgment); *United States v. Yonkers*, No. 80 Civ. 6761, 1989 WL 88698 (S.D.N.Y. August 1, 1989) (denying the State's motion to dismiss), *appeal dismissed*, 893 F.2d 498 (2d Cir. 1990).

Following the last determination as to vestiges, the Court has conducted an exhaustive inquiry[1] into the question of liability of the State and the UDC for the condition of unlawful *de jure* segregation which this Court has previously found to exist in the Yonkers Public School System. *United States v. Yonkers Bd. of Educ.*, 624 F.Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).[2]

By consent of the parties, there was established as a cut-off date for purposes of this inquiry the date of this Court's November, 1985 Opinion holding the City of Yonkers liable for the segregated conditions the Court found to exist. The virtue of the 1985 cut-off date is, of course, that it enables greater utilization of the record compiled in the original liability proceedings and permits the question to be posed whether the Court would have found the added State defendants to be liable had they been named as parties in the original proceedings. There was reserved to the parties the right

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[1] The YBE and NAACP introduced testimony of 31 witnesses and deponents and approximately 200 exhibits as well as three sets of admissions dealing with undisputed issues. The State also called several witnesses and introduced substantial documentation.

[2] In our vestiges opinion, we relied upon a comparison of achievement scores of minority and majority students *within* the Yonkers school district in concluding that minority students in Yonkers were not being afforded equal educational opportunities. Thus, the issue which is arguably before the United States Supreme Court in *Missouri v. Jenkins*, No. 93-1823 (U.S. argued Jan. 11, 1995), in which petitioner alleges that the trial court impermissibly engaged in a comparison of student test results in the school district in question with student test results in other (*i.e.*, suburban) districts, was not before this Court.

to present evidence concerning the period November, 1985 to date as part of a subsequent remedy proceeding, should such be deemed appropriate.

The Court has gathered from the parties, especially from counsel for the NAACP, who proffered evidence concerning post-1985 events, that any such evidence would be of a cumulative nature and not qualitatively different from the vast submissions already made. Such evidence, while perhaps pertinent to remedy, would seem to have little impact on questions of liability. We have therefore proceeded to determine questions of State liability on the basis of the present record. If a party is of the opinion that post-1985 evidence would alter any of the legal or factual conclusions set forth in this Opinion, and wishes for that reason to reopen these proceedings, the Court should be so advised in writing no later than 20 days from the date of this Opinion. The writing should set forth a description of the evidence that the party would seek to introduce and the reasons why it is believed that such additional evidence would lead to a change in the rulings made herein.

I.

CONTENTIONS OF THE PARTIES

The YBE and NAACP contend that the State contributed to the segregated status of the Yonkers Public Schools in several ways. The major emphasis has been on the alleged failure of the State officials primarily charged with education duties, *i.e.*, the members of the Board of Regents, the Commissioner of Education, and representatives of the Department of Education of the State of New York ("SED"), "to execute [State] education policy on racial integration and in impeding the implementation of that policy by local school officials in Yonkers." Yonkers Board of Education's Post-Trial Brief on State Liability Issues ("YBE Post-Trial Brief") at 2. Further, it is claimed that the State "unlawfully established an 'explicit racial' classification by singling out the racial integration policy as the one State education policy that would not be executed in accordance with the normal process of governance and decision making for education in New York State." *Id.* Independently of these grounds for the imposition of liability, the YBE and NAACP contend that the State is liable because of its participation in the development of housing in Yonkers which had a "known and foreseeable segregative effect on the public schools of Yonkers." *Id.* at 2-3.

The State asserts various defenses to these charges, including those of sovereign immunity and other jurisdictional defects. With respect to the housing claims, the State raises the defenses of statute of limitations and laches. On the merits, the State asserts that this case is controlled by *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), and that the YBE and NAACP's claims that the State could and should have more aggressively pursued efforts to end segregation have already been rejected as a basis for asserting liability against the State. The State further asserts that the YBE and NAACP have failed to prove that the actions of either the UDC or the State defendants with respect to housing caused segregative consequences to the Yonkers Public School System. The City of Yonkers supports the position of the YBE and NAACP that the State is liable for contributing to such conditions of segregation which the Court has found to exist in Yonkers.

II.

FINDINGS OF FACT

A. *Schools*

The YBE and NAACP claim that there is a causal relation between the acts and omissions of the State and the continuation of segregation in the Yonkers Public School System. The gist of their argument is as follows: that the State was aware of the severely segregative conditions that existed in the Yonkers Public Schools; that the State had the legal

authority as well as the practical power to intervene in Yonkers and to compel Yonkers officials to take steps to remedy those conditions; that State officials, motivated by a fear of controversy, an aversion to aggressive efforts at integration, and, in some instances, racial prejudices, effectively adopted a hands-off policy toward Yonkers, whereby the State would act in support of desegregation only if invited to do so by an individual complainant or by the Yonkers authorities themselves; and that this hands-off policy had the foreseeable effect of preserving the segregative conditions in the Yonkers Public Schools.

Having reviewed the entire record, the Court finds there to be ample evidence supporting the plaintiffs' contentions regarding the nature of the State's desegregative posture prior to 1985. Our specific factual findings are outlined directly below. In a later section, we will explain why the facts, as found, nonetheless do not provide a basis for holding the State liable as a constitutional joint tortfeasor under 42 U.S.C. § 1983, and why we do not reach the merits of possible State liability under The Equal Educational Opportunities Act of 1974, 20 U.S.C.A. § 1701 *et seq.* (West 1990).

1. *What the State Knew*

There can be no doubt that the State was aware early on of the existence of at least *de facto* segregation in the Yonkers Public Schools. The record in this area begins with a February, 1968 letter from Yonkers resident Ruth Lowe to then-State Education Commissioner James E. Allen, informing him that

> Yonkers public schools really need investigation—especially those in the predominantly Black ghetto areas. School 19 is a perfect example. This school has de facto segregation. Additionally, areas have been gerrymandered to keep this school segregated. . . . Something should be done to break up the All White and All Black schools of Yonkers. Can you do anything?

YBE Exh. 16-20. Commissioner Allen's assistant, Wilbur Nordos, wrote Ms. Lowe back that it was his hope that his division—the Division of Intercultural Relations, which at the

time had the primary responsibility for promoting racial integration in New York schools—could "be of help to the school authorities in Yonkers in working toward a reduction of racial imbalance in the schools of that City." *Id.* Whether intended to be that help or not, SED staff member Norman Kurland showed up in Yonkers several months later, telling a Yonkers audience that, from the data available, it was evident that

> there is great inequality in the schools of Yonkers. In the six schools with 31 percent or more Negro students, and the greatest concentration of Negro students in the City, we find these schools to be persistently below the minimum competence level. . . . With only 11 percent of Negro student[s], racial balance can be achieved easily. Right now they are concentrated into six schools. A more integrated system is most effective.

YBE Exh. 16-21 at 1, 4; *see also* Transcript of Trial Proceedings Dated April 20-21, 26-28, May 2-4, 9-12, 16-18, 23-25, 1994 ("Tr.") 387-89 (Siragusa).

During the years 1970-80, the SED formed a clearer picture of the segregative conditions in the Yonkers schools. In June, 1970, Commissioner Ewald B. Nyquist wrote Charles Curran, President of the YBE, that nearly one-fourth of the schools in Yonkers were at a 10% or greater variance from the district-wide average number of minority group students; Nyquist then reminded Curran of the Board of Regents' "recommendation" that student bodies reflect a cross-section of the entire school district, and requested that Curran report within one month on the steps being taken to eliminate segregation. YBE Exh. 16-32. In 1971, Yonkers was recognized as a potential "trouble-spot" that could benefit from "action" to reduce racial imbalance. YBE Exh. 16-44 at 4. When SED staff went to work on a comprehensive plan for school desegregation, pursuant to which the State would intervene in school districts exhibiting racial imbalance, Yonkers appeared as the second priority on a list of districts to be addressed. YBE Exh. 16-62.[3]

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[3] "There is serious imbalance in this district," wrote one SED staff member, "with almost two-thirds of the schools out of balance." YBE Exh. 16-46B.

When the SED was working with a task force in Yonkers to facilitate funding for school desegregation during the years 1975-76, it acknowledged that "Yonkers is the fourth largest district in the State. It is substantially segregated." YBE Exh. 16-71 at 2; *see also* Deposition of Leroy L. Ramsey, Dated May 3, 1990 ("Ramsey Dep."), at 29-31, 42. Finally, Gordon Ambach, Commissioner of Education from 1977 to 1987, testified that he had continuing knowledge while Commissioner of the racial imbalance in the Yonkers schools. Tr. 1447 (Ambach).[4]

In addition to knowing that segregation existed in the Yonkers schools, the SED can fairly be charged with knowing that Yonkers, if left to its own devices, was not going to remedy the segregation voluntarily. As will be discussed more fully below, there were two moments when self-initiated reform from within Yonkers seemed possible: the period 1970-71 and the period 1975-1978. In both instances, local residents in Yonkers opposed local reform; in both instances, the local reform impulse petered out; and in both instances, SED personnel were aware that no progress had been made. *See* YBE Exhs. 16-36; 16-46B at 29; Sobel Dep. at 121-27, 181-83, 191; Ramsey Dep. at 58-60, 80-84; Tr. 1448-49, 1453 (Ambach). While SED personnel may have hoped that Yonkers officials would make a "real demonstration of good will and effort" in a desegregation campaign, YBE Exh. 16-46B at 29, they had hard evidence before them indicating that such cooperation would not be forthcoming.

The closer question regarding the extent of the State's knowledge is whether the State was aware of the fact that the segregation in the Yonkers schools was *de jure* rather than *de*

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[4] The State was kept informed of the segregative conditions in the Yonkers schools primarily by virtue of statistical information depicting the racial composition of school districts and particular school buildings which the SED required local school personnel to submit. *See, e.g.*, Deposition of Stanley C. Campbell, Dated November 28, 1990 ("Campbell Dep."), at 37-38: Ramsey Dep. at 22-26; Deposition of Morton J. Sobel, Dated April 17, 1990 ("Sober Dep."), at 176; Tr. 61-62 (Sheldon). These "racial censuses" began in 1966 and continued annually thereafter. YBE Exh. 16-50 at 2.

facto. The State clearly knew that the Yonkers schools were segregated; but did it know that the segregation was due to the intentional segregative practices of Yonkers officials? Several former State education officials testified that they themselves did not have such knowledge. Ramsey Dep. at 65-66; Tr. 1468 (Ambach). Indeed, it was suggested that State education personnel generally did not inquire into whether any given instance of school segregation in New York was *de facto* or *de jure* because they did not need to know: it was thought that the segregation of students along racial lines deserved to be combatted whatever its cause, since it posed an inherent threat to the quality of elementary and secondary school education. Ramsey Dep. at 65-67; *see also* YBE Exh. 4-15, "Special Message From the Commissioner," Dated June 14, 1963 ("Public education in such a situation [of racial segregation] is socially unrealistic, blocking the attainment of the goals of democratic education . . . *whether the situation occurs by law or by fact*") (emphasis added). It is also to be noted that the statistics relied upon by the SED to inform itself of the racial composition of individual schools and districts, *see supra* note 4, apparently did not disclose the cause of the racial breakdown. Tr. 2724-25 (Griffith).

Nevertheless, the Court finds that the State defendants were aware of circumstances that should have alerted them to the likelihood that Yonkers had a substantial problem of unlawful segregation in its schools. The Court further finds that if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant.

To begin with, SED officials knew that *de jure* segregation had been found to exist in New York State in the past, and that it was therefore not unthinkable that it should exist there again at some point. *See* YBE Exh. 3-8c at 4, "A Review of the Recent Legal History of School Desegregation as Prepared by the Office of the Counsel, New York State Education Department," Dated September 12, 1969 ("[o]ne Court found that the New Rochelle school district in our own State was acting unlawfully when it gerrymandered attendance zone lines so as to perpetuate a high degree of racial imbalance . . . ."). There is also evidence that SED officials were aware

as early as the mid-1970's that there was a substantial over-representation of minority students in Yonkers special education classes—a state of affairs that could hardly be explained by the usual adventitious factors, such as housing patterns, which produce *de facto* segregation and which are constitutionally neutral. *See* YBE Exhs. 16-60 at 7; 16-85; 17-20 at 3; Campbell Dep. at 74-77; Ramsey Dep. at 67-69; Tr. 1008-13, 1066-67 (Batista); Tr. 1760-63, 1774 (Cox-Gerlock).[5] Finally, there is evidence that some SED staff knew during the mid-to-late 1970's that Yonkers was planning to build subsidized housing in a way that would aggravate segregation. *See* Sobel Dep. at 223.

Yet, despite these various warning signals, there is no evidence that SED officials ever took any steps to investigate the causes of racial segregation in the special education classes, or, for that matter, the causes of the increasing segregation in the regular classes. The Regents, for one thing, appear to have studiously avoided discussing the issue of school segregation after about 1975. *See* Tr. 920-21 (Keyes); Tr. 2421-23 (Carr); Tr. 2625, 2627-28 (Griffith); Tr. 2782-83 (Genrich). And the sole inquiry that is documented in the record—a report by SED Counsel Robert Stone to Commissioner Ambach in 1980 on whether *de jure* segregation on the basis of race existed in any school district in New York—was superficial and did not represent a serious inquiry into whether *de jure* segregation existed in New York schools or not.[6]

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[5] Racial segregation in the special education classes was one of the unlawful conditions in the Yonkers schools that federal authorities found to exist, and decided to prosecute, in 1980. *See* YBE Exh. 17-120 at 3.

[6] Commissioner Ambach had requested Stone to report to him on whether *de jure* segregation existed in any educational institution in New York. YBE Exh. T. Stone responded with the conclusory statement:

> I assume that the . . . reference to *de jure* segregation relates to segregation on the basis of race, color or national origin, and does not relate to segregation or distinctions based on such other factors as age or sex.
>
> Based upon that assumption, and since *de jure* of course means arising out of a legal requirement, I think we can say with con-

On the whole, the Court finds that State education officials chose to assume that the segregation they were tracking in Yonkers was *de facto* rather than *de jure*, and that they chose to make this assumption not only without any positive foundation for it but in the face of actual conflicting evidence relating to special education and subsidized housing construction. Moreover, we find no basis in the record for the suggestion that it was the State's commitment to the cause of rooting out all segregation, whatever its type, which made it blind to the actual causes of the segregation in the Yonkers schools.

In sum, the Court finds that the State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*.

2. *What the State Had the Power to Do*

The next question is: given its (actual or constructive) knowledge of illegal racial segregation in the Yonkers schools, what, if anything, could the State do about it? The answer is: a great deal. New York law has prohibited *de jure* segregation since 1900. *See* N.Y. Educ. L. § 3201(1) (McKinney 1995). As early as 1960, the New York State Board of Regents issued a policy statement urging school districts to take the steps necessary to end *de facto* desegregation in New York's public schools. YBE Exh. 3-1. The Regents reaffirmed that position in a series of subsequent racial integration policy statements. *See* YBE Exhs. 3-7; 3-12; 11-17; 17-44. These policy statements could have been enforced by the Commissioner in several different ways.

Section 306 of the Education Law, for example, invests the Commissioner with the authority to remove school officials who fail or refuse to comply with "any decision, order, rule or

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fidence that *de jure* segregation on the basis of race, color or national origin does not exist in any school district or educational institution in this State.

YBE Exh. U.

regulation of the regents or of the commissioner . . . ." N.Y. Educ. L. § 306(1) (McKinney 1988). The Commissioner also has the authority under this provision to withhold state financial aid from an offending school district. *Id.* § 306(2). Although the calls for local action made in the Regents' racial integration policy statements did not amount to "orders," "rules," or "regulations," *per se*, testimony given at trial indicated that they could in fact have served as the basis for § 306 sanctions against non-complying school districts. *See* Tr. 2255-56 (Stone); Tr. 2788-89, 2816-19 (Genrich).

In a similar vein, § 310 of the Education Law gives the Commissioner the authority to institute, either on his own initiative or at the behest of a private citizen, quasi-judicial proceedings designed to enforce State education policies.[7] Such policies would undoubtedly include the objectives enunciated in the Regents' racial integration policy statements. *See* Tr. 2236-39 (Stone); Tr. 2819 (Genrich).

As a third option, the Commissioner and the Regents could have taken a regulatory approach to the problem of continuing segregation in the schools. That is to say, the Commissioner and the SED, working with the approval of the Regents, could have issued regulations requiring school districts to develop and submit plans for desegregating their schools, and could then have set up an enforcement apparatus consisting of site visits and compliance reports to ensure that such plans were in fact being carried out. See Tr. 2248-51, 2261-62 (Stone); Tr. 2781 (Genrich) (the Regents looked to the Commissioner to instruct school districts to develop desegregation plans within a certain time frame).

As a fourth option, the Commissioner could have used his authority under § 408 of the Education Law to ensure that the

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[7] Section 310 provides in pertinent part:

> Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article.

N.Y. Educ. L. § 310 (McKinney 1988).

building or purchase of new school facilities by local districts advanced the goal of school desegregation, rather than hindered it. Section 408 provides that before any school building may be constructed or purchased, the plans and specifications for it must be submitted to and approved by the Commissioner. N.Y. Educ. L. § 408(1) (McKinney Supp. 1995). The Commissioner is not to grant such approval, however, unless the plans submitted reflect "reasonable consideration" of the manner in which the proposed school fits into "a comprehensive, long-term school building program." *Id.* § 408(3) (McKinney 1988). No reason was offered by the State defendants as to why the Commissioner could not have taken the position that new school proposals that did not further desegregation did not fit well into "a comprehensive, long-term school building program,. and should therefore not be approved.

Finally, as a fifth option, the Commissioner and his staff could have adopted the time-honored strategy of using the carrot rather then the stick: they could have recommended to the legislature that funding proposals for the benefit of local school districts be made contingent upon the adoption of desegregation programs.[8]

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[8] It is important to note that these supervisory and enforcement options are not recognized as such merely as a matter of hindsight, but rather were available to the State at the time of the events in question in this litigation. For example, in the early 1970's, when the SED was considering a plan of proactive intervention in districts exhibiting a high degree of racial imbalance, one SED official had this to say about the Commissioner's § 310 powers:

> Strictly speaking the Department [*i.e.*, the SED] has not *initiated* action in individual school districts. Formal Department action of the kind that results in a Commissioner's order to a district to develop a plan for correcting racial imbalance has always come as a result of an appeal to the Commissioner by citizens of a school district. . . . It is true that Section 310 does provide for the Commissioner himself instituting hearings in which a district would be required to show cause why it does not correct racial imbalance. The use of this provision of the Law is, of course, a possibility: whether or not it will be used has not been decided at this point.

YBE Exh. 16-44 at 5 (emphasis in original); *see also* YBE Exhs. 16-50 at 4; 16-62 at 4. One of the racial integration policy statements issued by

The State's position, as we understand it, is that while State educational officials may *nominally* have had the power to force local school districts to desegregate, they were for all practical purposes precluded from using that power. It was suggested at trial, for instance, that withholding general state financial aid under § 306 was an indiscriminate approach to a discrete problem which would have harmed the very children the desegregation policies were meant to help. Tr. 1428-31 (Ambach); Tr. 2194-95, 2197-99 (Stone). It was argued that the Commissioner was in a poor position to initiate proceedings *sue sponte* under § 310 (as opposed to ordering a proceeding in response to a private citizen's complaint) because (1) there did not exist a publicly announced set of criteria and standards as to exactly what constituted unacceptable racial segregation in the schools; the Commissioner would consequently have no prescriptive basis on which to issue a § 310 order; and (2) there did not exist a record of the particular case as prepared by private parties; the Commissioner would consequently have no factual basis on which to issue a § 310 order. YBE Exh. 14-34; Tr. 2206-07, 2238, 2261 (Stone). It was argued that the State could not develop and apply a uniform set of regulations in the desegregation context because the physical and demographic uniqueness of each school district compelled a tailor-made approach. Tr. 1392-93 (Ambach); Tr. 2207 (Stone). Finally, it was suggested that the State undertook careful monitoring and enforcement actions

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the Regents endorsed the idea of State initiative in desegregation matters by putting squarely on the State the responsibility of stepping in and imposing remedial measures in the event that local officials failed to act. *See* YBE Exh. 3-7, "Integration and the Schools: A Statement of Policy and Recommendations by the Regents of the University of the State of New York," at 12 ("Where the solution to the problem [of racial integration in the schools] is beyond the capability of the local school districts, or where a district fails or refuses to act, then the responsibility for corrective action is clearly and inescapably that of the State."). And, when Gordon Ambach began his tenure as Commissioner of Education in 1977, he told the SED staff that, with regard to racial integration, "[w]here local district action lags or is outside legal obligation, our responsibility is to assure [that] the rights of all persons are protected fully." YBE Exh. 14-44 at 7.

only when the State was administering the expenditure of federal funds. *See* Tr. 1057-60 (Batista).

We reject this entire line of argument. None of these alleged obstacles to State enforcement action is more than rationalization to justify inaction. The withholding of general state financial aid from disobedient school districts was perhaps too strong a deterrent, but the State had threatened at least one school district with it in the past—ironically, Yonkers—and with considerable success.[9] Had the Commissioner chosen to proceed *sua sponte* under § 310, he would have labored under no disadvantage or difficulty that he did not already face in the § 310 proceedings he routinely brought at the request of private citizens. The measure of acceptable levels of integration would have been exactly what it was in the non-*sua sponte* cases, that is, the Regents' racial integration policy statements, Tr. 2236, 2238-39 (Stone); and, guided by the statistics annually collected by the SED, the Commissioner would have had all the information he needed to determine whether a given school district exhibited an unacceptable degree of racial imbalance. See *supra* note 4.[10]

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[9] In the mid-1950's, a number of Yonkers citizens complained to State education officials that the Yonkers schools were being neglected and inadequately funded. After considering the citizens' appeal, then-Commissioner Wilson concluded that:

> [i]t is quite evident that as Commissioner of Education I am not justified in apportioning public moneys to any community if it fails to carry out its own obligations in the way of providing instructional services for its children. The situation at Yonkers will need to be resolved to the extent that I am satisfied that it is proper for me to continue to apportion public moneys to such district. . . . The [Yonkers] Board of Education will be required to submit to me before January first next sufficient evidence of an adequate program, both in respect to its education offerings and its building needs for the ensuing year, which would justify me in making an apportionment for such year.

YBE Exh. 2-3 at 1. When Yonkers showed an intention to comply with the State's recommendations for improving its school system, the State withdrew its threat to cut off state aid. *Id.* at 4.

[10] In citizen-instigated and *sua sponte* § 310 proceedings relating to desegregation, the burden is simply to establish the existence of racial

As for the feasibility of general regulations in the desegregation context, it was conceded at trial that State regulations oftentimes require schools districts to prepare plans for dealing with educational conditions that vary from district to district. Tr. 1506-07 (Ambach); *see also* Tr. 2250 (Stone). There is no reason to believe that the State could not have issued regulations requiring each school district, including Yonkers, to submit a plan detailing the racial makeup of its school population and outlining the steps it planned to take to remedy any unacceptable imbalance. Indeed, in 1963, then-Commissioner Allen effectively did just this, albeit in the form of a letter rather than a regulation. YBE Exh. 4-15. Finally, the record shows that the State has not hesitated to intervene in local school districts in instances where only state money is involved. *See* Tr. 1626 (Raymond) (state intervention in the area of physical education); Tr. 1768 (Cox-Gerlock) (state intervention in the area of guidance). The record does not support the State's claim that intervention occurred only when the State was monitoring the expenditure of federal funds.

By all accounts, the SED is one of the most activist state educational bodies in the country. See, *e.g.*, Tr. 1773 (Cox-Gerlock). It vigorously monitors and regulates many different aspects of education, including special education, bilingual education, vocational training, achievement scores, dropout prevention, and school building construction. Contrary to the defendants' characterization, the SED has not subscribed to what one might call a "laissez-faire" approach to educational oversight. When, for example, a fatal football accident occurred in Yonkers, the State's interest, involvement, and presence were prompt and keenly felt. Tr. 1618-24 (Raymond). To argue, then, that when it came to enforcing its own school desegregation policy, the State somehow came up short in supervisory authority, is singularly unpersuasive.

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imbalance in the challenged school district, not to establish the cause of the imbalance. Tr. 2239 (Stone). The statistical data the SED routinely collected would therefore have provided the Commissioner with an adequate factual basis on which to proceed.

The Court finds that the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so.

3. *What the State Did (or Did Not Do)*

From the moment in the late 1960's that the State became aware that conditions of racial imbalance were developing in the Yonkers schools, it was in a position to require Yonkers to undertake remedial measures. It never took advantage of that position. The State never threatened to withhold state financial aid from Yonkers or to remove those Yonkers school officials who opposed efforts to integrate the Yonkers schools; it never initiated *sua sponte* a § 310 proceeding designed to investigate and remedy the segregative conditions in the Yonkers schools; it never wrote regulations addressing the issue of school desegregation; it never directed Yonkers officials to consider the segregative impact of new school construction or acquisition before approving their submitted plans and specifications; and, it let pass opportunities to condition state aid to the schools on local desegregation efforts, *see, e.g.*, YBE Exh. 14-7; Tr. 1528-32 (Ambach). The State did not, in short, require anything of Yonkers in the area of school desegregation. The one instance in which State education officials seemed prepared to intervene affirmatively in Yonkers and organize and/or compel desegregation efforts was in 1971-72, when Commissioner Nyquist put his staff to work on a "master plan" for desegregating the most racially imbalanced school districts. *See* YBE Exhs. 16-46(A),(B),(D),(E); 16-50; 16-62. The master plan never materialized, however; it was shelved for lack of State funding. Tr. 178-79 (Sheldon).

Rather than act, the State waited. It waited for private citizens in Yonkers to invoke the State's help by filing § 310 petitions, *see* Ramsey Dep. at 89; Tr. 1451-55 (Ambach), but no petition was ever filed. It waited for Yonkers to make voluntary efforts to desegregate its schools, and asserts that it

stood ready with offers of money and technical assistance to aid such efforts. Ramsey Dep. at 90-91, 93-94; Tr. 1454 (Ambach). But it never forced the issue. When, for example, the Yonkers education community appeared ready in 1970-71 to take steps to end the segregation in the schools, YBE Exh. 17-17, the SED dispatched staff member Morton Sobel to talk to the local PTA groups. Sobel's message was relatively soft: Yonkers is a segregated district: segregation is not good for children; it is up to you to do something about the condition in your schools. Sobel Dep. at 187-88; Tr. 404-05 (Siragusa). When Yonkers did nothing about the condition in its schools, the State dropped the issue. *See* Sobel Dep. at 191-93; Tr. 190 (Sheldon).

In the fall of 1975, when the Yonkers education community again showed an inclination to undertake reforms, the State reappeared on the scene. This time, however, it could not even deliver on its promise to provide meaningful financial aid for the local reform effort. YBE Exhs. 17-79; 17-81; Tr. 348 (Ross); Tr. 1155-56 (Jacobson). And, when this second effort ultimately fizzled out in 1977-78, in no small part due to the State's failure to contribute funds, the State once again said and did nothing. *See* Ramsey Dep. at 92-94; Tr. 1448-52 (Ambach).

Not even when the federal government intervened in Yonkers in 1980, alleging violations of the federal civil rights laws, did the State seek to hold Yonkers accountable for its long-standing violation of the State's school desegregation policy. Tr. 1634 (Raymond). The most the State did was to offer to procure federal funding for Yonkers to help pay the cost of complying with the federal desegregation order, and to provide technical assistance in the development of a desegregation plan. Defendants' Exh. XX; YBE Exh. 17-131; Ramsey Dep. at 82-83. When the YBE ultimately decided to fight the federal order, the State withdrew these offers of aid, YBE Exh. 17-134, and was not heard from in the matter again. The State even let pass an opportunity to cajole Yonkers into complying with the federal desegregation order when, in 1984, it refused to condition its financial bailout of Yonkers on the

City's ratification of a consent decree with the federal government. *See* YBE Exh. 17-156; Tr. 1632-33 (Raymond).

In sum, with all of its authority and knowledge of the segregative conditions in the Yonkers schools, the State essentially adopted a wait-and-see attitude. It asserted a willingness to help Yonkers help itself, but it would not force Yonkers to change. Thus it occurred that in Yonkers, where local support for desegregation was minimal and no citizen-initiated § 310 proceeding was ever commenced, desegregation simply did not take place until it was compelled by order of the federal court.

At this point, it is important to make clear what factual findings the record *does not* support. There is no evidence that State education officials ever undertook affirmative actions to preserve segregation in the Yonkers schools, or that they indicated to anyone in Yonkers, either tacitly or otherwise, that they thought that segregation in the schools should be preserved. There is no evidence that State education officials ever actively impeded Yonkers officials from taking steps on their own to remedy the school segregation. There is no evidence that State education officials ever communicated to anyone in Yonkers that they would purposefully "look the other way" should Yonkers decide to continue to be in violation of State desegregation policy. There is no evidence that State education officials ever adopted a policy that indicated specific approval of the manner in which Yonkers was managing the racial makeup of its schools. Finally, there is no evidence that, had a Yonkers citizen filed a desegregation § 310 petition, the State would not have responded to that petition promptly and fairly. Indeed, the record supports the finding that the Commissioners of Education in most instances enforced the racial integration policy in connection with proceedings brought before them by private citizens under § 310.[11]

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[11] The State made serious efforts to inform the Yonkers public as to how a private citizen or citizens' organization could trigger a State investigation under § 310. *See, e.g.*, YBE Exh. 17-49 at 1.

4. *Why the State Did Not Intervene in Yonkers*

The State exhibited a determined reluctance to enforce its own desegregation policy in Yonkers, and a significant portion of the trial was devoted to an inquiry into why that was so. The Court accepts in large part the plaintiffs' explanation, which is that race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation.

During the 1960's and early 1970's, State education officials actively set about to bring an end to the racial imbalance that existed in the New York public schools. The Regents strongly endorsed school desegregation in the racial integration policy statements of 1960, 1963, 1968 and 1972. YBE Exhs. 3-1; 3-2; 3-7; 3-12. The SED, under Commissioner Nyquist, did not hesitate to enforce the racial integration policy in connection with § 310 appeals from private citizens. In each of these proceedings, Commissioner Nyquist found that *de facto* segregation existed and sought to institute remedial measures. Moreover, the SED under Nyquist took steps to formulate a comprehensive plan of affirmative state intervention in school districts that exhibited a high degree of *de facto* segregation. YBE Exhs. 16-46(A),(B),(D),(E). The activist tenor of the SED's position during these years is perhaps best captured in a report on State integration initiatives written by an SED staff member in 1972. Concerning the Albany school district, the staff member wrote, "[n]o citizen has ever appealed for the correction of racial imbalance, but Albany should not for that reason be neglected." YBE Exh. 16-50 at 4.

By 1969, however, opposition to non-voluntary means to achieve racial integration in the schools—and to racial integration itself—had swelled to the point where the New York State Legislature enacted Chapter 342, a law that prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions. Although the statute was ultimately declared

unconstitutional, as violative of the Equal Protection Clause, *see Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970) (three judge court), *aff'd*, 402 U.S. 935 (1971), the attitude of the State Legislature was clear. Indeed, even after Chapter 342 was struck down, the Legislature continued to debate and pass bills and resolutions that were similar to Chapter 342 in their purpose and intended effect. *See, e.g.*, YBE Exhs. 7-21(A)-(E); 7-22; 7-28; 7-37.

Following the invalidation of Chapter 342, the State took measures that had the cumulative effect of undermining efforts to reduce school segregation. In 1971, the Legislature eliminated the Racial Balance Fund, which was the source of funding to assist communities in undertaking the expensive task of desegregating their schools, and refused each year thereafter to reinstate the Fund despite annual requests to do so from State education officials. The elimination of the Fund deprived State officials of one of the few positive inducements they had to encourage local acts of desegregation, and thereby weakened their efforts to implement the Regents' racial integration policy. YBE Exh. 16-62 at 2; Campbell Dep. at 43-45; Tr. 90-91 (Sheldon).

Changes were also taking place in the composition of the Board of Regents due to the accession to the Board of new Regents, interviewed prior to appointment by legislators (a new practice), who were known to be hostile to vigorous desegregation efforts.[12] In February, 1974, a law was passed that shortened the Regents' term of office from fifteen to seven years in order to make them more "accountable" to elected officials and their constituents. YBE Exh. 10-13; Tr. 2545 (Griffith). In the summer of the same year, the Regents, prodded by criticism of Commissioner Nyquist's vigorous desegregation efforts, *see, e.g.*, YBE Exh. 10-15, undertook a reexamination of their 1972 racial integration policy state-

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[12] In 1976, one New York State Senator refused to vote for a bill that was similar to Chapter 342 on the grounds that he had already taken the steps needed to stop forced busing by voting for the election of three new regents, "everyone of whom" was opposed to Commissioner Nyquist's § 310 efforts. YBE Exh. 7-37 at 79 (remarks of Senator Halperin).

ment. That reexamination resulted in revised policy statements that diluted the pro-desegregation force of the 1972 statement.[13] In at least two instances, individual Regents interceded in Commissioner Nyquist's § 310 proceedings to plead the case for less drastic desegregation orders. *See* YBE Exhs. 12-20; 12-21; Defendants' Exhs. 6H; 6I. And the Regents as a whole, out of a concern to rein in Nyquist's desegregation efforts, *see* YBE Exh. 12-25 at 1; Defendants' Exh. 6K at 1, 3, lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders. YBE Exh. 12-71. That legislation became law in 1976.

Finally, in November, 1976, the Regents fired Commissioner Nyquist. The YBE and NAACP sought to prove at trial that he was fired because of his vigorous stance on integration, while the State argued that relations between Nyquist and the Regents had so deteriorated that his continued service was unacceptable. Indeed, there is ample evidence that Nyquist's dealings with some Regents was high-handed and offensive and that, to a considerable extent, he precipitated his own removal. In all, we find that the plaintiffs have not proven that Nyquist would not have been fired but for his views on integration. We do find, however, that his views on this subject were a substantial factor leading to his discharge.

In the years following Nyquist's removal, the furor over desegregation died down to a considerable extent. And with good reason: Nyquist's successor, Gordon Ambach, was not presented with any § 310 appeals from private citizens; and, in accordance with the practice of his predecessors, he did not initiate any § 310 proceedings *sua sponte*. Tr. 1412 (Ambach). With respect to the § 310 appeals he inherited from Commissioner Nyquist, there is evidence to suggest that Commissioner Ambach eventually issued orders that were less stringent, from a remedial standpoint, than the orders initially

[13] The revised statements emphasized that desegregation efforts, such as the use of forced busing, should not be allowed to jeopardize the health and safety of children, *see* YBE Exh. 11-17, and that the use of quantitative measures (*i.e.*, quotas) was not the sole or even principal means for detecting and correcting school segregation. YBE Exhs. 3-14; 17-44.

fashioned by Commissioner Nyquist. *See* Defendants' Exhs. C-27 & C-28 (Ambach extended by one year the time that the Rockville Centre school district had to begin integrating its elementary schools; Nyquist had previously denied an extension); C-46 & C-47 (Ambach allowed Syracuse to delay the integration of three elementary schools).

There is little doubt in the Court's view that the State's gradual retrenchment from its once strong school desegregation policy, as just outlined, was motivated by a growing antipathy to desegregation on the part of the New York State Legislature. To be sure, the debate that was being conducted during these years was cast in terms of being for or against busing. The evidence is clear, however, that "busing" was a symbol for integration. Busing, after all, was common in many areas of the State for reasons having nothing to do with matters of race (*e.g.*, for the purpose of school centralization programs). While there were those who raised good-faith questions as to the conditions under which busing should take place, the furor over busing *per se* cannot be explained on any non-racial grounds.

What is more, this growing antipathy to desegregation did not go unnoticed by the SED officials charged with promoting school desegregation. There was testimony, which the Court finds credible, that these SED officials regarded the Regents' revisions of the 1972 policy statement, their support of stricter review of the Commissioner's § 310 orders, and their firing of Commissioner Nyquist as part of an effort to retreat from the commitment to school desegregation. Campbell Dep. at 48-49, 101-02; Tr. 147-48, 212 (Sheldon); Tr. 884-86, 916-17 (Keyes). There was testimony that SED officials perceived the Legislature to be making appointments of Regents with the racial integration policy in mind. Tr. 108-09 (Sheldon). And, perhaps most importantly, there was testimony that these impressions on the part of SED officials had the effect of making them slow down and proceed more cautiously in their desegregation efforts. *See, e.g.*, Tr. 916-19 (Keyes).[14]

[14] There is no evidence that the Legislature or the Regents ever made any efforts to communicate to SED officials that, despite appear-

To sum up: the State had the power to act in support of school desegregation in Yonkers, but it lost the will to act. And it lost the will to act for the simple reason that its once touted principles of racial equality in the schools had become politically untenable.

5. *The Effect on Yonkers of the State's Failure to Intervene*

The State's failure to intervene in Yonkers impacted the City in several ways. The most obvious impact, of course, is that Yonkers was not forced to desegregate its schools. There is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions. *See* Deposition of Gerald L. Freeborne, Dated October 30, 1990, at 103;[15] Tr. 1625-28 (Raymond); Tr. 2249 (Stone); Tr. 2784 (Genrich).

The second impact on Yonkers was more subtle, but equally real. There is evidence that when the State failed to intervene in Yonkers, either coercively or by way of positive inducements, it altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform. For example, the response to SED official Morton Sobel's rather tepid call to action in 1971 (recounted *supra* p. 21) was a "mixed bag":

> There were people that were delighted that they didn't have to deal with the issue [of desegregation], that it seemed as though it wasn't imperative. There were others that were very disappointed such as I was that we

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ances to the contrary, they continued to support vigorous desegregation efforts.

15 "Q. : With respect to the state requirements[,] if a school district wasn't in compliance with state requirements, did that lead to some direct action by the state to bring them into compliance or was there some recognition, well, we have these requirements, not everyone has to follow them?"

"A.: Where a problem was identified, they would be told to correct the situation, and I can't think of an instance where it was not corrected once the problem was identified."

> didn't get more specific information from him regarding help. Both ends.

Tr. 405 (Siragusa).

In October, 1975, the YBE authorized the formation of a task force to develop a plan for desegregating the Yonkers schools. The task force urgently requested financial aid from the SED, YBE Exhs. 17-54; 17-68; 17-71, and the SED quickly promised roughly $80,000 in funding. However, the SED was unable to furnish any money until May, 1976, and then only $13,000. YBE Exhs. 17-56 at 2; 17-81; Tr. 303-05, 307, 344 (Ross). This lack of funding hindered the efforts of the task force, Tr. 1138 (Jacobson), and delayed the presentation of its recommendations to the YBE. And this delay, in turn, enabled opposition to the reform efforts to coalesce to a point where the YBE became hostile to the very desegregation initiative it had originally commissioned. Tr. 313-14, 321-22 (Ross); Tr. 439-41 (Siragusa).

Finally, in 1978, when the Yonkers community was considering the desegregation plan of then-Superintendent Joseph Robitaille, an influential Yonkers taxpayers association that opposed the plan had the following to say about the possibility of State intervention should the plan be rejected:

> The State Department of Education is the other governmental agency able, by means of funding, to force an integration plan on the school board. This agency, however, after going through a period marked by particularly zealous integration directives, is modifying its approach. Last spring, the former commissioner of education Ewald Nyquist, was dismissed because of his single-minded pursuit of desegregation throughout the state by busing and other means whether or not warranted. It is now obvious that the Board of Regents is taking a more cautious view of integration cases and directives. . . . It is clear that busing for integration purposes is out of favor even at the state level, and that there is very little likelihood that the commissioner [Ambach] would

> mandate a forced busing program on the city of Yonkers.
>
> . . .
>
> [We] therefore again recommend[ ] that the Board of Education reject [Superintendent Robitaille's plan] without being intimidate[d] by fear of federal or state agency sanctions.

YBE Exh. 17-113 at 4.

As is evident from this passage, there was a public perception in Yonkers that Commissioner Nyquist's termination came as a result of his pro-integration stance. This perception added to the widespread belief that the State would not aggressively address the problems in the Yonkers schools or elsewhere in New York. And, whether accurate or not, this belief bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone.[16]

B. *Housing*

The New York State Urban Development Corporation ("UDC"), established by the New York State Legislature in April 1968, was perhaps the most powerful state housing and development agency ever created. Tr. 1249-51 (Danielson). Combining functions, such as housing finance and project development, that were formerly performed by separate entities, the UDC was also given the unprecedented authority to override local building and land use controls and to exercise powers of eminent domain. YBE Exh. 6-9 at § 16; Tr. 754 (Hayden); Tr. 1252 (Danielson).

Headed by president and chief executive officer Edward Logue, the UDC was run by a staff of enthusiastic and idealistic persons dedicated to the creation of fair housing. Depo-

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[16] As was the case with SED officials who entertained a similar belief, the State made no serious effort (such as by a statement from the Board of Regents itself) to dispel the notion that the State had ceased to be committed to school desegregation. *See, e.g.*, Tr. 2383-87 (Kendall); 2609-11 (Griffith). The Regents can be charged with knowledge of the public's impression of State retrenchment on desegregation matters because of the news clippings from around the State which they regularly received and reviewed. *See* Tr. 2384 (Kendall); Tr. 2553-54 (Griffith).

sition of Edward J. Logue, Dated December 13, 1991 ("Logue Dep."), at 26, 29, 52, 153; Tr. 753-54 (Hayden). There is and can be no serious allegation that the UDC staff had a malicious desire to further racial discrimination in Yonkers or elsewhere.

UDC was initially invited by local officials to become active in Yonkers when that City was faced with the threat by Otis Elevator Company, a major employer and economic presence in Yonkers, that it would move away from Yonkers unless it could expand its existing plant. Otis plant expansion required the relocation of significant numbers of persons, primarily minority members, for whom housing accommodations within Yonkers had to be created. *See Yonkers Board*, 624 F.Supp. at 1317; Logue Dep. at 79; Tr. 735 (Hayden).[17]

The UDC embarked on this task with enthusiasm, initially pushing for "scattered site" housing throughout the City of Yonkers.[18] Logue Dep. at 135; Tr. 760 (Hayden); Tr. 815 (Morris); Tr. 1163 (Galgano). For example, a list of possible sites referred by the UDC to City officials in June, 1969 contained eleven locations in different parts of the City. *See Yonkers Board*, 624 F.Supp. at 1317; YBE Exh. 19-36; Tr. 562 (Pistone). However, the UDC was soon made aware of strong local opposition to the building of subsidized housing in the predominantly white areas outside of Southwest Yonkers. *See Yonkers Board*, 624 F.Supp. at 1317-18. The UDC clearly had at least some knowledge that this opposition was race-based. Tr. 539 (Pistone); Tr. 694 (Gibson); Tr. 753, 762 (Hayden); Tr. 853 (Morris); Tr. 1281-82 (Danielson).

We find that the UDC, confronted with this race-based community opposition and concerned about the political feasibility of scattered-site housing, made a determination not to exercise its statutory override powers, which would have

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[17] Ultimately, Otis Elevator rejected proposals to stay in Yonkers and opted to move out. *See* 624 F.Supp. at 1319.

[18] "Scattered site" housing refers to housing that is geographically distributed in different neighborhoods, as opposed to housing concentrated in low-income, heavily minority areas. *See, e.g.*, Deposition of Gerald Lenaz, Dated May 18, 1983 ("Lenaz Dep."), at 97.

enabled it to proceed without local approval.[19] Tr. 696 (Gibson); Tr. 762 (Hayden); Tr. 1281-83, 1288-89 (Danielson). Between 1969 and 1975, the UDC sponsored 1,200 of the 2,600 units of subsidized housing for families approved and opened in Yonkers. *See Yonkers Board*, 624 F.Supp. at 1313.[20] These units, as well as those in two senior citizens projects built during the same period, were concentrated in the Southwest region of the City. *Id.* This Court has previously found that the concentration of new housing in Southwest Yonkers worsened the already segregated state of housing and schools in the City. *Id.* at 1364, 1500.

During and after 1973, various factors threatened the financial stability of the UDC and increasingly curtailed its housing program. YBE Exh. 6-62. The precipitating event was the federal government's moratorium on all new federal housing subsidy commitments under section 236 of the National Housing Act, upon which the UDC had become highly dependent. Defendants' Exh. ZZZ; YBE Exh. 6-48 at 8; Logue Dep. at 63-64, 75, 178; Tr. 1271 (Danielson). This and other factors eventually led the UDC and its housing program into default. YBE Exh. 6-66 at 3. In 1975, the State bailed out the UDC and effectively ended its housing program. YBE Exh. 6-66; YBE Exh. 20-63 at ¶ 10; Tr. 1690-92 (Danielson).

The UDC advances several explanations for its determination not to exercise its statutory override powers in order to achieve "scattered site" housing. First, UDC representatives testified that one of their chief priorities was to build good housing promptly. Tr. 735-36 (Hayden). Their hope was that

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[19] In addition to using its override powers to achieve scattered-site housing despite community opposition, the UDC could have used the threat of such an action as leverage in negotiating with local public officials to achieve the same result. *See* Tr. 1253 (Danielson) (describing the override power as "a bargaining instrument of very substantial potential."). However, there is little evidence that the UDC attempted even this lesser course of action.

[20] The UDC approved these units pursuant to a Memorandum of Understanding entered into with the City in July, 1970 and amended in 1971 and 1972. YBE Exhs. 19-81; 19-113; 19-174.

once the community witnessed the high quality of this initial housing, it would more readily accept additional housing. Tr. 695, 709, 720-21 (Gibson); Tr. 782-83 (Hayden). Second, the UDC maintains that the construction in fact undertaken was the most integrative subsidized housing ever built in Yonkers and was intended to be marketed pursuant to a plan that would have resulted in an integrated tenancy. YBE Exhs. 20-9 to 20-12; Logue Dep. at 137, 142-44; Examination Before Trial of Marion Scott at 60-63, 168-69; Tr. 762, 799-800 (Hayden). Finally, witnesses testified that the construction in Southwest Yonkers was but the first phase of the UDC's intended activities in the City. Had the UDC's housing program not come to an abrupt and unforeseen halt, the UDC would have pursued its long term plans for scattered-site housing. Lenaz Dep. at 242, 275; Tr. 717-18 (Gibson); Tr. 781-82 (Hayden).

We accept as true the UDC's explanations for its actions. Nevertheless, we find that between 1969 and 1975 the UDC, regardless of its long-term plans or good intentions, knowingly acquiesced and indeed participated in the segregative site selections for which this Court has already found the City of Yonkers to be liable. *Yonkers Board*, 624 F.Supp. at 1376.

III.

CONCLUSIONS OF LAW

A. *Schools*

1. *Sovereign Immunity*

As a threshold matter, the State has raised a number of issues relating to sovereign immunity which go directly to the Court's subject matter jurisdiction over the State defendants. As will be recalled from prior opinions in this impleader action, the plaintiffs allege that the State defendants have engaged in a continuing pattern of conduct contributing to segregation in the Yonkers schools in violation of, *inter alia*, the Fourteenth Amendment to the Constitution, Title VI of

the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1988) ("Title VI"), and other civil rights statutes, 42 U.S.C. §§ 1981, 1983, 1985, and 1988 (1988). The State argues that none of these legal provisions furnishes a basis for overcoming the sovereign immunity of the State of New York, its officials, and its agencies under the Eleventh Amendment.

The State's claim for the most part fails. Apart from State defendant Mario Cuomo, *see infra* pp. 37-40, there exists no jurisdictional bar to suit against the individual State defendants (*i.e.*, the individual Members of the Board of Regents and the Commissioner of Education) and the Director of the UDC, all sued in their official capacities. It is by now well-established that the Eleventh Amendment does not bar suit in federal court against a state official for prospective injunctive relief to remedy a continuing wrong. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Ex parte Young*, 209 U.S. 123 (1908). In the context of school segregation cases such as this one, a "continuing wrong" exists as long as state officials fail or refuse to eliminate from the public schools all vestiges of segregation for which they are either partly or wholly responsible. *See, e.g., United States v. Fordice*, 112 S.Ct. 2727, 2735, 2737 (1992); *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 459 (1979); *Milliken*, 433 U.S. at 289-90. Accordingly, should the Court conclude that the conduct of the individual State defendants prior to 1985 contributed to school segregation in Yonkers, and that these defendants have failed to remedy the segregation since 1985, the Eleventh Amendment would not bar an order requiring them to share the costs of eliminating those vestiges of segregation that continue to exist. And, once the Eleventh Amendment bar were removed, 42 U.S.C. § 1983 could clearly serve as an affirmative basis of legal liability. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).[21]

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[21] Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

As regards Mario Cuomo, sued here in his official capacity as (ex-) Governor of the State of New York, the Court agrees with the State that he should be dismissed as a defendant because there does not exist a sufficient connection between him and the alleged wrongdoing. *See* State and UDC Defendants' Post-Trial Brief on Liability ("State Post-Trial Brief") at 12-17. As the Supreme Court explained in *Ex parte Young*, 209 U.S. at 157:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

In *Gras v. Stevens*, 415 F.Supp. 1148, 1152 (S.D.N.Y. 1976) (three-judge court) (Friendly, J.), the court applied this language to dismiss a § 1983 lawsuit against then-Governor Rockefeller on the grounds that the Governor's general duty to enforce state laws, *see* N.Y. Const. art. IV, § 3 (McKinney 1987), did not, without more, establish the necessary connection between him and the statute alleged to be unconstitutional. *See also Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 953 (9th Cir. 1983) (dismissing § 1983 school desegregation action against the Governor of California), *cert. denied*, 467 U.S. 1209 (1984).

In the present case, the connection between Governor Cuomo and the alleged unconstitutional conduct of the State is too thin to conclude that he, independently of the State of New York, is a real party in interest. As the State points out, it is the Commissioner of Education's duty, not the Governor's, to enforce "all general and special laws relating to the educational system of the state . . . ." N.Y. Educ. L. § 305(1) (McKinney 1988). The Governor has no role in the appointment of state education officials, *see* N.Y. Const. art. V, § 4 (McKinney 1987); N.Y. Educ. L. §§ 202(1) (McKinney Supp. 1995), 302 (McKinney 1988); nor does he make general policy recommendations for elementary and secondary school education. Rather, the Board of Regents has the responsibil-

ity of determining State educational policy, N.Y. Educ. L. § 207 (McKinney 1988), and the Commissioner has the responsibility of executing it. *Id.* § 305(1). Given this institutional structure, which distances the Governor of New York from involvement in educational affairs, it is perhaps not surprising that none of the factual allegations listed in plaintiffs' second amended complaint and amended answer directly implicates Governor Cuomo. Perhaps most importantly, plaintiffs have not indicated how the present Governor of New York would have the legal responsibility for implementing an order by this Court to eliminate the vestiges of past segregative acts by the State. *Cf. Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984) (" 'The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter' " (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam)).[22]

In light of the foregoing, the Court concludes that it lacks subject-matter jurisdiction over this action as it relates to Governor Cuomo. He is, accordingly, dismissed as a defendant in this action.

The final sovereign immunity issue concerns whether the Eleventh Amendment bars suit against defendants State of New York, the SED, and the State Board of Regents.[23] The general rule, of course, is that the Eleventh Amendment is an

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[22] The plaintiffs did introduce at trial evidence indicating that Governor Cuomo played a role in the State's decision in 1984 not to condition its financial bailout of Yonkers on the City's acceptance of a consent decree with the federal government. *See supra* p. 22. We do not think, however, that the Governor is amenable to an order to provide prospective relief to the Yonkers schools simply because he may have purposely decided to forego a one-time instance of political leverage over Yonkers. This instance appears to have been an anomaly, in the sense that it brought a State official who normally had no direct involvement in educational matters into *ad hoc* contact with an educational problem.

[23] The Second Circuit Court of Appeals has already decided that the UDC may not successfully assert the Eleventh Amendment as a defense to this action. *United States v. Yonkers*, No. 92-6198, slip op. at 3 (2d Cir. Jan. 13, 1993).

absolute bar to suits brought in federal court against states and their agencies without either the state's express or implied consent or an express abrogation by Congress of the state's Eleventh Amendment immunity. *See, e.g., Pennhurst*, 465 U.S. at 99-101.[24] The record before the Court does not include any consent, either express or implied, by the State of New York to permit this suit to proceed in federal court against itself or its agencies. The question remains whether Congress by statute has expressly abrogated the State's Eleventh Amendment immunity. (We say "by statute" because the Fourteenth Amendment, by its own force, does not override a state's Eleventh Amendment immunity. *See Santiago v. New York Dep't of Correctional Servs.*, 945 F.2d 25 (2d Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992)).

The first point to be made is that, by enacting 42 U.S.C. §§ 1981, 1983, and 1985, Congress did not abrogate the state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979) (Eleventh Amendment immunity not abrogated by § 1983); *Rucker v. Higher Educ. Aid Bd.*, 669 F.2d 1179, 1184 (7th Cir. 1982) (§§ 1981, 1985); *Davis v. Buffalo Psychiatric Center*, 623 F.Supp. 19, 20 (W.D.N.Y. 1985) (§ 1981).

However, plaintiffs may proceed against the State and its agencies under Title VI. That statute provides, in pertinent part, that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

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[24] Whether the New York State Board of Regents can be classified as a State "agency" for Eleventh Amendment purposes appears to be a question of first impression in this Circuit. However, given that the Second Circuit has ruled that the State University of New York is itself an integral part of the government of the New York and partakes of the State's sovereign immunity, *see Dube v. State University of New York*, 900 F.2d 587, 594-95 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991), we conclude that the University's governing body—the Board of Regents—enjoys sovereign immunity as well.

> discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Title 42 U.S.C. § 2000d-7 then provides:

> (a) General provision
>
> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964 . . . .
>
> . . .
>
> (b) Effective date
>
> The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

The State makes two main arguments with respect to the sovereign immunity implications of Title VI in this case. It first contends that because Title VI prohibits discrimination only by "any program or activity receiving Federal financial assistance," and because the State itself is neither a "program" nor an "activity," *see* 42 U.S.C. § 2000d-4a (1988), Title VI should be construed to repeal the sovereign immunity of state agencies but not the immunity of the states themselves.

We reject this argument. There is nothing in the terms of Title VI that indicates that an entity must be a "program or activity" if it is to be sued for a violation of Title VI. On the contrary, the plain language of § 2000d-7(a)(1) quite clearly provides that the Eleventh Amendment immunity of the state itself is abrogated, and it does not differentiate in any way between the immunity of the state and that of its instrumentalities. This plain-language meaning is arguably reinforced by the fact that Congress amended Title VI to make clear that the statute authorizes suit against an entire system for the discriminatory practices of a discrete program within that system receiving federal funds. *See* Pub. L. No. 100-259, § 6, 102 Stat. 28, 31 (1988) (codified at 42 U.S.C. § 2000d-4a); *Board*

of Educ. v. Georgia, No. CV 490-101, slip op. at 15-16 n.7 (S.D.Ga. Sept. 24, 1990). Moreover, nothing in the legislative history of Title VI compels the conclusion that an entity must be a "program" or "activity" to be a Title VI defendant. *See Association of Mexican-American Educators v. California*, 836 F.Supp. 1534, 1542-43 (N.D.Cal. 1998) (reviewing the legislative history of Title VI and concluding that the State of California was a proper Title VI defendant). We therefore hold that the State of New York can be sued under Title VI as long as it, along with those of its agencies receiving federal financial assistance, is alleged to have been responsible for a Title VI violation.[25] *Accord id.* at 1543; *Board of Educ. v. Georgia*, slip op. at 15-16.

We also reject the State's argument relating to the Board of Regents' and SED's amenability to suit under Title VI. The State concedes that both of these agencies, "as 'program[s] or activit[ies] receiving Federal financial assistance' . . . are proper defendants to a Title VI claim of discrimination occurring after October 21, 1986 . . ." State Post-Trial Brief at 18. The State contends, however, that the evidence presented at trial related only to State conduct occurring before 1985, and that pre-1985 conduct cannot give rise to a violation of

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[25] Plaintiffs have alleged that the State of New York, in the form of the State Legislature, contributed to the school segregation in Yonkers by, *inter alia*, passing and debating bills designed to limit the efficacy of State desegregation efforts and refusing to provide the financial support necessary for successful desegregation. *See, e.g.*, Second Amended Complaint of Plaintiff-Intervenors Yonkers Branch NAACP, et al., ¶¶ 20-25, 35, 37; Cross-Claim of the Yonkers Board of Education, ¶¶ 14-23, 30.

Contrary to what the State urges, neither the First Amendment nor the Speech and Debate Clause of Article 1, § 6 of the Constitution is implicated by a holding that acts and omissions of the State Legislature furnish the basis for a claim against the State under Title VI. The issue is not whether members of the State Legislature are to be punished under the Constitution or a federal statute for what was said and done in the Legislature during the years in question in this lawsuit. Rather, the issue is whether the State's attitude toward desegregation, as made known through what was said and done in the State Legislature, properly gives rise to an allegation that the State, along with its instrumentalities, contributed to a violation of rights for which the remedy of a lawsuit in federal court has been explicitly provided.

Title VI in light of the effective date of that statute's non-retroactive abrogation of immunity (October, 21, 1986). The State further contends that the continuing *effects* of any discriminatory practices engaged in prior to October 21, 1986 are not actionable under a "continuing wrong" theory. The idea here is that the non-retroactive nature of Title VI's abrogation would effectively be nullified if the "continuing wrong" theory were allowed to make actionable acts occurring before the effective date of the statute.

The State is correct in pointing out that the presentation of evidence was limited, by agreement of the parties and the Court, to State conduct occurring prior to 1985. *See supra* p. 2. This fact alone does not insulate the State from the reach of Title VI, however, for unlike the State, we do not see a problem in respecting both the non-retroactive nature of Title VI's abrogation of immunity and the integrity of the principle that holds that a state violates the Fourteenth Amendment for as long as it fails to eliminate policies and practices traceable to a prior system of *de jure* segregation which it helped create. The "continuing wrong" theory collapses, in the unique context of equal opportunity in schooling, the traditional legal distinction between harmful acts, on the one hand, and their consequences or effects, on the other.[26] If, then, the pre-1985 acts of the State defendants contributed to the maintenance of a dual school system in Yonkers (a question the merits of which we address below), those acts can be said to be occurring *to this day* to the extent their effects have yet to be remedied.[27] The non-retroactive nature of Title VI's abrogation,

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[26] As we discuss below in our section on the UDC, this is not the case with regard to actions taken by governmental actors in areas other than education. *See infra* p. 68.

[27] The State's position throughout this litigation has been that it did not intentionally support or contribute to the segregation in the Yonkers schools. The State has never made an alternative argument to the effect that, even if it *did* intentionally support or contribute to segregation in Yonkers prior to 1985, it has since taken the steps necessary to eliminate the effects of its unconstitutional acts. Indeed, the Court has already found, in a separate proceeding, that vestiges of segregation do continue to exist in the Yonkers schools. *See United States v. Yonkers*, 833 F.Supp. 214 (S.D.N.Y. 1993).

with its October, 1986 cut-off date, therefore properly does not bar this suit. *See Fordice*, 112 S.Ct. at 2743 ("To the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and *Title VI* and remedial proceedings shall be conducted") (emphasis added).[28]

It is equally clear, however, that the non-retroactivity of Title VI is to be given full effect in those situations where a "continuing wrong" theory does not apply. A state that successfully integrated a once-dual school system *prior to* October, 21, 1986, for example, would presumably be protected from a suit for damages by § 2000d-7(b).

In light of the foregoing, we hold that the Board of Regents and the SED, like the State of New York itself, may be sued under Title VI. And we conclude overall that the Eleventh Amendment does not bar this suit as it relates to any of the defendants with the one exception of Governor Cuomo.

2. *The Merits*

All of which brings us to the critical legal issues:

a) Is the State liable under 42 U.S.C. § 1983 for knowingly tolerating *de jure* segregation in Yonkers?

b) Is the State liable under 42 U.S.C. § 1983 for dealing with integration in a manner different from other educational matters?

c) Is the State liable under The Equal Educational Opportunities Act of 1974, 20 U.S.C.A. § 1701 *et seq.* (West 1990) ("EEOA")? Is this issue properly before the Court?

a. *Liability under § 1983*

The YBE and NAACP, in urging that the State is liable on a joint tortfeasor theory under § 1983 because it knowingly failed to address segregation in the Yonkers Public School System, although having a self-imposed duty to do so, rely

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[28] The *Fordice* Court appeared to assume, without actually deciding, that post-October, 1986 vestiges of pre-October, 1986 discriminatory acts are actionable under Title VI.

primarily on a trilogy of cases arising in Ohio. *See Brinkman v. Gilligan*, 610 F.Supp. 1288 (S.D. Ohio 1985); *Penick v. Columbus Bd. of Educ.*, 519 F.Supp. 925 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Reed v. Rhodes*, 500 F.Supp. 404 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

In these cases, the courts dealt with the question of whether state inaction in the face of continued segregation in Dayton (Brinkman), Columbus (Penick), and Cleveland (Reed) triggered state liability. Each court answered the question in the affirmative.

In language strongly relied on by the YBE and NAACP, the court wrote in *Reed* that:

> The failure of the State Board to take actions intended to eliminate segregation can, when combined with other facts, support a finding of constitutional violation, for 'the Constitution can be violated by inaction as well as deeds.' [citations omitted] Thus, a state which initially compelled or authorized the creation of a local dual system of education has a continuing affirmative duty to eradicate all lingering effects of segregation; the neglect of that constitutional duty renders the State liable. . . . Even if a State took no part in the creation of a local dual system of public education, it can be liable with local officials if it or its agents adhered to a deliberate policy of tolerating or supporting intentional racial segregation.

500 F.Supp. at 424. Although the court in *Reed* found inaction, "when combined with other facts", to be a basis for state liability in Ohio, it cited with approval the holding of the Second Circuit in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978), that a state's knowing failure to meet its obligation to eradicate segregation is insufficient to impose liability on the state. 500 F.Supp. at 424.

In *Brinkman*, the court concluded that:

> Had the state defendants acknowledged their affirmative obligations under state and federal laws to investigate

> and eliminate segregation and had the power to withhold state funding been exercised, there is a substantial probability that the Dayton schools would not be in the condition found to exist in 1972. The failure of the state defendants to exercise their obligations promptly under state and federal law was a proximate cause of the plaintiffs' deprivation . . . .

610 F.Supp. at 1297. *See also Penick*, 519 F.Supp. at 941-42.

Of course, there are significant factual distinctions between the Ohio cases and this New York case, the most apparent perhaps being the initial responsibility of the State of Ohio for the creation of a dual school system. *See Brinkman*, 610 F.Supp. at 1293.[29] Nonetheless, were the Ohio cases to stand alone, we would find them highly persuasive.

But the Ohio cases do not stand alone; they must be considered together with *Arthur v. Nyquist*. In *Arthur*, suit was brought against the Commissioner of Education of the State of New York and the members of the Board of Regents, as well as against local Buffalo education officials. The district court found these defendants liable for intentionally causing and maintaining a segregated school system in Buffalo, and the Court of Appeals affirmed as to the local defendants. As to the state parties, however, the Court reversed.

The Court first noted that as early as 1960, the Board of Regents had issued a policy statement urging desegregation of the New York public schools. The Court next noted that the Commissioner had responded to a § 310 complaint filed in 1964 by requiring the Buffalo School Board to submit plans to desegregate. A plan submitted by the Buffalo Board failed to be implemented because the Buffalo City Council refused to appropriate funds. 573 F.2d at 145.

In 1972, the Commissioner instructed the Buffalo Board to submit a new plan, but it refused to do so. The Commissioner's staff then drew up and submitted its own recommendations to the Buffalo Board, but the Board rejected the proposals. Finally, in 1975, the Commissioner issued a show

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[29] New York has outlawed *de jure* segregation since 1900.

cause order to the Buffalo Board in which he threatened to exercise his statutory enforcement powers. In 1976, the *Arthur* class action was started.

The Court of Appeals began its legal analysis by noting that:

> Authority over education in New York State is vested in the Department of Education, which manages and supervises all New York State public schools. . . . The Commissioner is responsible for the implementation of educational policy formulated by the Board [of Regents]. He can enforce his directives by removing any school officer or member of a board of education who disobeys an order, and by withholding funds from a disobedient school system.

573 F.2d at 146.

The Court then wrote, in language highly relevant to these proceedings:

> Appellees argue on this appeal that, having primary responsibility for educational policy in New York State, the state appellants are liable for Buffalo's school segregation. They assert that the appellants are liable both because they failed to combat segregation as aggressively as they might have, and, in a derivative sense, because they are legally responsible for the City's segregative acts.
>
> We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. [30] Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.

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30 We note that this statement would apply *a fortiori* to Yonkers, since by virtue of the § 310 proceedings, the State played a far more active role vis-a-vis the Buffalo segregated schools than it did vis-a-vis the Yonkers segregated schools.

We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a constitutional violation. As we indicated in *Hart v. Community School Board*, *supra*, 512 F.2d at 48:

> We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation.

To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case.

Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith.

Similarly, we do not believe that the appellees' theory of derivative or indirect liability can be sustained. Such a theory is precluded by the Supreme Court's opinion in *Rizzo v. Goode*, *supra*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561, which requires a more direct link between the illicit school segregation and an intentional policy adopted by the state appellants which indicates specific approval of the actions of the city appellants. No such approval is indicated in this case.

> Under the standard announced in *Hart*, then, we are unable to conclude that the state appellants acted or omitted to act with the required segregative intent, and hence we must reverse the trial court's finding of liability as to these appellants.

573 F.2d at 146.

Although it is the case that in Buffalo there was a state response in progress to a § 310 proceeding and that no § 310 proceeding occurred in Yonkers, it is a close and difficult question whether the issues before this Court are qualitatively different from those dealt with by the Court of Appeals in *Arthur v. Nyquist*. The *Arthur* Court acknowledged the power that resided in the state educational authorities to deal with segregation in Buffalo and accepted the proposition that, "given the chosen policies of the state appellants, it was [not] unforeseeable that the Buffalo schools might remain segregated for an extended period of time." 573 F.2d at 146. But, the *Arthur* Court tells us, more than knowledge of wrongdoing and the power to end it is required before § 1983 liability can be imposed on a state. What else is required? If it can be shown that state and local authorities conspired to thwart state desegregation policies, the result would be different. If it can be shown that state officials gave local authorities *specific* approval, and thereby support, of their unlawful conduct, the result would be different. But the *Arthur* Court searched the record in vain for evidence of such complicity and approval, and we have engaged in a like inquiry, with like results. *See supra* pp. 22-23. The closest one approaches to approval is, in our opinion, the determination by the Commissioner and his staff not to recommend to the Legislature that funding proposals for the benefit of local school communities be made contingent on adoption of desegregation programs. But the reason advanced was a concern that the legislation would fail in its entirety, not a desire to perpetuate segregation.

Indeed, there is no evidence of any affirmative pro-segregative action on the part of the State. The reining in of Commissioner Nyquist and the adoption of less aggressive integration statements over the course of the 1970's are com-

pelling evidence that the State's policy with respect to local segregation grew increasingly passive and reactive, but the policy cannot fairly be categorized as being affirmatively in favor of segregation. State permissiveness and, in truth, state hypocrisy in the face of local segregation are not automatically tantamount to state encouragement and/or authorization of segregation. *See Arthur*, 573 F.2d at 146. That anti-desegregation groups in Yonkers tried to find in the State's permissiveness signs of actual, positive support for their position says something about the political forces at work in Yonkers; but it does not without more transform the State's failure to intervene in Yonkers affirmative support of school segregation in Yonkers, from a legal standpoint. *Cf. Reitman v. Mulkey*, 387 U.S. 369, 373-81 (1967) (concluding, in the context of a state-action inquiry, that the California legislature actually encouraged private acts of discrimination by expressing its "policy of neutrality" in the form of an amendment to the state constitution which prohibited, in ringing terms, any interference with such acts of discrimination).

Since we are unable to find, after an exhaustive inquiry, conduct on the part of the State which would satisfactorily distinguish this case from *Arthur v. Nyquist*, and since this case, rather than the Ohio precedents, is controlling on this Court, we answer in the negative the question of whether the State may be held liable for knowingly tolerating, *i.e.*, for not proceeding aggressively against, the *de jure* segregation that existed in the Yonkers schools.

b. *Liability for dealing with integration in a manner different from other educational matters*

The YBE and NAACP urge a second theory of state liability under the Equal Protection Clause and § 1983 which has not so much to do with the nature of the State's involvement in Yonkers as it does with the inconsistent and racially-identifiable manner in which the State pursued its various policy goals. Plaintiffs argue:

> [E]ven without regard to the intent underlying its conduct, the State unlawfully established an 'explicitly

> racial' classification by singling out the racial integration policy as the one State education policy that would not be executed in accordance with the normal process of governance and decision making for education in New York State.

YBE Post-Trial Brief at 2.

We have found that the State's policy of passivity with regard to school segregation matters was atypical conduct on the part of the State; in all other areas of concern, the State adopted regulations and aggressively monitored and enforced compliance with State education policy. *See supra* p. 19. If, then, the operative legal principle here is what plaintiffs suggest—that a state violates the Equal Protection Clause if it singles out its race-oriented policies for neglect or lackluster enforcement—the facts of this case would probably compel a finding of liability on the part of the State.

However, we have neither found nor been directed to any authority that holds that, wholly apart from the question of whether a state is jointly responsible with local actors for acts of racial discrimination, a state violates the Equal Protection Clause if it fails to enforce its race-oriented policies as vigorously as its non-race-oriented policies. There is, to be sure, ample authority for the proposition that a state cannot, consistently with equal protection, pass a statute or other promulgation that has the practical effect of restructuring the governmental decision-making apparatus in a way that imposes unique burdens on racial minorities seeking to enact legislation. In *Hunter v. Erickson*, 393 U.S. 385 (1969), for example, the Supreme Court struck down an amendment to the city charter enacted by the citizens of Akron, Ohio, which required that any fair housing ordinance be approved by a majority of the city electorate, whereas all other ordinances could be passed by a vote of the city council itself. The Court found that the Akron amendment

> drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and

> those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: [passage by vote of the city council]. But for those who sought protection against racial bias, the approval of the City Council was not enough. A referendum was required by charter at a general or regular election, without any provision for use of the expedited special election ordinarily available.
>
> . . .
>
> Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

393 U.S. at 390, 392. Similarly, in both *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 487 (1982), and *Lee v. Nyquist*, 318 F.Supp. at 720, it was held that laws limiting the extent to which certain educational authorities could assign students to schools on the basis of race worked a practical restructuring of the decision-making process as it related to education, and did so to the obvious detriment of those citizens who desired to improve the situation of racial minorities in the schools.

In each of these three cases, the equal protection violation lay in the fact that the state had adopted measures making it more difficult, from a procedural standpoint, to address racial issues in ways beneficial to racial minorities. Each of the challenged provisions created a procedural "gauntlet" that only those interested in the well-being of minority citizens were required to run. *Hunter*, 393 U.S. at 390. Each provision singled out race as the one factor that warranted altered legislative procedures and redirected lines of policy-making

authority. And, not coincidentally, each provision had the intended effect of hampering the achievement of racial equality.

Though the principles stated in *Hunter*, *Washington*, and *Lee* are compelling, they cannot be stretched to cover the facts of this case. It is certainly true that, owing to its passivity, the State addressed racial issues in education in ways that were less than optimally beneficial to racial minorities. But it cannot be said that the State defendants distorted the governmental process by adopting measures making it more difficult to pursue a political path supportive of school desegregation. With the exception of Chapter 342, which was declared unconstitutional shortly after its passage, the State did not rig the political system in a way that "assist[ed] one particular group in its struggle with its political opponents." *Hunter*, 393 U.S. at 393 (Harlan, J., concurring). Decision-making power was not abruptly shifted from central to local authorities (*see Lee*), or vice versa (*see Washington*), when it came to educational decisions bearing racial overtones. Rather, decision-making authority stayed where it always had been—with State educational authorities—and continued to be as susceptible to majority rule as ever. While some New York citizens may understandably have disliked the fact that the State did not push vigorously for desegregation, they were no more disadvantaged politically in their ability to seek changes in State policy than those who cheered the status quo.

It is these facts that distinguish this case from *Hunter*, *Washington*, and *Lee*. As Justice Harlan noted in *Hunter*, it is one thing for supporters of racial equality to have to fight legislative battles with their hands tied behind their backs; it is another (quite constitutional) thing for supporters of racial justice to fail to win a majority of the votes needed to prevail in an equally-weighted voting system. 393 U.S. at 394-95 (Harlan, J., concurring). Though State legislators and State education officials undoubtedly acted with racial consciousness in making decisions about segregation in the schools, they did not act pursuant to a voting scheme that weighted the votes in their favor. They therefore did not act pursuant to any

racial classification that the courts have heretofore found constitutionally untenable.

For the foregoing reasons, then, we reject plaintiffs' second argument for the imposition of liability on State educational authorities for the school segregation in Yonkers. We cannot conclude that, in the absence of any other constitutional violation, the State acted pursuant to a racial classification that was unconstitutional.[31]

c. *Liability under the EEOA*

Before addressing the merits of the claims raised in regard to the UDC and housing, it is important to note the dialogue the Court has had with the parties relating to the relevance of a federal statute that was not otherwise cited by the plaintiffs in their complaint against the State nor relied upon by them as to any substantive questions of liability.[32] The EEOA provides in relevant part that:

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[31] The United States Supreme Court has decided to review a decision by the Colorado Supreme Court holding that a state constitutional amendment that prohibits considerations of sexual orientation from being used as grounds for preferential treatment or "protected status" violates the Equal Protection Clause. *See Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S.Ct. 1092 (1995); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S.Ct. 419 (1993). The Colorado Supreme Court based its ruling on its conclusion that the state amendment infringes the fundamental right of citizens to participate in the political process on equal terms by making it comparably more difficult for members of an "identifiable group" (*i.e.*, those of homosexual or bisexual orientation) to win passage of legislation in their interest. 854 P.2d at 1282. The court assumed, without deciding, that gay men, lesbians, and bisexuals do not constitute a suspect class. *Id.* at 1275. The Colorado case thus concerns the extent to which, *in the absence of a suspect class*, a state may remove from the normal, sub-constitutional legislative process issues that are of particular concern to discrete groups of citizens.

Here, however, plaintiffs sue on behalf of a group recognized by the courts to be a suspect class. This case accordingly presents different issues from those raised in *Romer*.

[32] Neither the NAACP's Second Amended Complaint nor the YBE's Cross-Claim against the State includes any citation to the EEOA. However, the NAACP did rely on the EEOA for jurisdictional purposes in its papers in opposition to the State's motion to dismiss. *See* Plaintiff-Intervenors' Reply To State Defendants' Motion To Dismiss at 14-15 (filed with the Court on June 9, 1989).

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . . .

Id. § 1703. For the purposes of § 1703, an "educational agency" is either "a local educational agency or a 'State educational agency' as defined by [20 U.S.C. § 2891]." *See* 20 U.S.C. §§ 1720(a), 3381. Section 2891 defines "local educational agency" as including public boards of education, such as the YBE. It defines "State educational agency" in a way that clearly includes both the SED and the Board of Regents: "The term 'State educational agency' means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools." Section 1706 of the EEOA then permits

> an individual denied an equal educational opportunity, as defined by this subchapter[, to] institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.

Finally, § 1714 of the EEOA provides that:

> No court, department, or agency of the United States shall, pursuant to section 1713 of this title [prioritizing various remedial measures], order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

In the course of addressing the issues raised by the plaintiffs' claims against the State, the Court itself considered whether the EEOA might be of some relevance. By telephone

conference, followed by an order dated February 28, 1995, the Court alerted the parties to its consideration of the possible substantive impact of the EEOA on these proceedings. The concern with the EEOA arose because the plain language of the statute seems to provide a basis for holding a state vicariously liable for the discriminatory acts of local educational authorities. Indeed, it can be argued that if one were to set about to write a statute in away that provided for vicarious state liability, one could not find language that was more clear and direct than that contained in § 1703 of the EEOA. The literal meaning of § 1703 is that a state denies an individual an equal educational opportunity by virtue of the discriminatory acts of local educational actors, without regard to the nature of the state's own involvement in the local schools. No "direct link" between the local violation and an intentional state policy, nor any "complicity," "posturing," or "bad faith" on the part of the state (the *Arthur* formulations) is required by § 1703's language before the state can be held accountable for a denial of equal schooling in a federal action brought pursuant to § 1706.

The one case that has interpreted the EEOA in the desegregation context has concluded that the EEOA does authorize a form of derivative state liability. In *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), the plaintiffs alleged, much as they do here, that the state defendants had known that local educational authorities were operating the schools in a racially segregated manner, and that, notwithstanding this knowledge, they continued to aid the maintenance of segregation "through the provision of state funds . . . [and by] failing and refusing to take any necessary or appropriate action to bring the operation of the [local] schools into compliance with the Fourteenth Amendment . . . ." 577 F.2d at 1346-47. The lower court dismissed the state defendants from the action on the grounds that, even if the state defendants were guilty of the alleged acts, they had not violated the substantive protections of the EEOA as contained in § 1703(a), (b) and (d).

The Sixth Circuit reversed the order of dismissal.

> The gravamen of the complaint against the State defendants is not that they directly engaged in discriminatory assignment of students and teachers, but that they tolerated and provided assistance to a local school district which they knew to be engaging in such practices. The District Court apparently felt that the statute applied only to direct acts of discrimination, not to indirect assistance to districts violating the [EEOA].
>
> We do not believe that the State can escape liability under the [EEOA] merely because its support for the proscribed actions was indirect. . . . Congress plainly intended that the practices listed in § 1703 be ended. Such a goal can only be subverted by allowing states to knowingly support the prohibited practices with impunity. This is particularly true where state assistance forms a sizable part of the local school district's budget. We seriously doubt that Congress intended to allow states to bankroll dual school systems, while enacting a statute specifying remedies for the elimination of such systems.

577 F.2d at 1347-48 (citations omitted).[33] *See also Idaho Migrant Council v. Board of Educ.*, 647 F.2d 69, 70-71 (9th Cir. 1981)

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[33] The *Ferndale* Court appeared to believe that the standard of state liability under § 1703 of the EEOA was coextensive with the standard of state liability under 42 U.S.C. § 1983. *See* 577 F.2d at 1348 (noting that the same principle of joint liability animates the two statutes). *But see id.* at 1346 (reserving decision on whether the rights guaranteed by the two statutes are the same). The State relies on this fact to argue that *Arthur v. Nyquist*, setting forth the Second Circuit's construction of state liability under § 1983, controls any interpretation of § 1703 of the EEOA, such that if plaintiffs lose under *Arthur*, they lose under the EEOA. *See* The State Defendants' Brief in Response to the Court's February 28, 1995 Order at 9-10.

However, as discussed above, the Sixth Circuit has interpreted liability under § 1983 in a more expansive way than the Second Circuit. *See supra* part III.A.2.a. Any conclusion on the Sixth Circuit's part that the EEOA imposes the same substantive duties as § 1983 is attributable, in our view, to its more expansive reading of § 1983 rather than to an overly broad interpretation of the scope of the duties imposed by the EEOA.

(construing § 1703(f) of the EEOA to impose upon the states the supervisory duty of ensuring that local educational authorities do not fail to take action to overcome language barriers that impede equal participation in the schools).

In response to this Court's February 28, 1995 Order, the parties filed briefs. The YBE took the position that the EEOA was not of significance here because, like the State, it believed that the parameters of liability under the EEOA were coterminous with those under § 1983. But, as the YBE recognized, *see* Yonkers Board of Education's Supplemental Brief in Response to the Court's Order of February 28, 1995 at 8, the language of the EEOA on its face appears to impose on the states the very type of supervisory liability for the conduct of local actors that the *Arthur* decision foreclosed. Moreover, since the *Arthur* Court's ruling that a state is not liable unless it acts affirmatively to foster segregation relates exclusively to an action brought under § 1983, and since the *Arthur* decision does not discuss the EEOA,[34] *Arthur* is not binding with respect to a finding of liability under the latter statute.

The NAACP took the position that the EEOA imposes on states the duty to ensure that segregative practices on the part of local educational agencies are stopped, and that a state's failure to so ensure renders it liable under the statute. The NAACP characterized the duty imposed by the EEOA as "coextensive with the Fourteenth Amendment, if more pointed and specific." Plaintiff-Intervenors' Memorandum of Law on Applicability of 20 U.S.C. sec. 1701 et seq. at 2-4 & n.2.

The State, in addition to reasserting its position regarding the sovereign immunity implications of the EEOA and contesting the nature of the substantive rights guaranteed by it, argued that the legislative history of the EEOA persuasively indicates that Congress intended the statute to be an anti-busing measure and not a basis for expanding state liability in school desegregation cases. Moreover, the State argues that the limitations on remedies imposed by the EEOA, which include limits on the use of involuntary busing, *see* 20 U.S.C.

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[34] Neither the *Arthur* decision itself, nor the pleadings and briefs filed in the case, contains any citation or reference to the EEOA.

§ 1714, relate to the totality of a remedial scheme ordered by a court, and thus would preclude resort to the EEOA in a case, such as this one, in which a remedy order imposed a decade ago and still in force utilized busing.

The Court finds the question whether it should *sue sponte* rely on the EEOA for the purpose of assessing the State's liability on the schools issue to be an extremely troublesome one. On the one hand, the issues relating to the EEOA are purely legal questions, and a voluminous record has been compiled in this case which is entirely relevant to EEOA liability. Failure to address the question of EEOA liability might lead to the commencement of a new proceeding explicitly predicated on that statute, with an attendant waste of resources by the litigants and the courts.

On the other hand, plaintiffs, aided by able counsel with vast experience in school desegregation litigation, have chosen not to move to amend the complaint to encompass an EEOA claim and have only equivocally embraced a reliance on that statute.

On balance, we conclude that the most prudent course of action is to confine this opinion solely to the issues directly presented by the parties, *i.e.*, the State's liability under § 1983 and other claims explicitly stated in the complaint. We leave to another day and any further application of the parties the question of whether, in the context of the Yonkers desegregation proceedings, the EEOA provides any basis for relief from the State.

B. *Housing*

1. *Introduction*

We turn next to the questions relating to the State's role in site selection and development of housing in light of this Court's prior determination, *see* 624 F. Supp. at 1500-1503, affirmed by the Court of Appeals, *see* 837 F.2d at 1233, that there is a close interrelationship between school segregation and segregative housing patterns in Yonkers, each affecting and aggravating the other.

The YBE and NAACP claim that the UDC's actions relating to site selection for housing in Yonkers create an independent ground for liability against the UDC. Alternatively, they claim that these actions by the UDC can be imputed to the State or to State education officials in order to find these defendants liable. Finally, they appear to make the argument that the conduct of the State education officials themselves must be evaluated in a context that includes recognition of the housing conditions in Yonkers and that this circumstance distinguishes this case from *Arthur v. Nyquist*. In essence, this final contention is that the State's affirmative role in site selection for Yonkers housing provides the "something more" than mere passive condoning of segregation which the Court found in *Arthur v. Nyquist* and which this Court has found herein, absent a consideration of the housing aspects of this case.

The YBE and NAACP rely on a number of cases in which state participation in housing has been a basis for imposition of state liability for school segregation. In a case concerning the city of Indianapolis, for example, the Seventh Circuit held:

> Undoubtedly there are many contributing causes for racial segregation. But however complex the problem, it is clear that if residential segregation results from current or past segregative housing practices, there is a causal relation between those practices and the segregated schools. Therefore, *if the state has participated in or contributed to these segregative housing practices* either directly (e.g., selective location of public housing) or indirectly (e.g., involvement in discriminatory practices in the private housing market), *it can be said that the state has caused, at least in part, the segregation in schools.*

United States v. Board of Sch. Comm'rs, 573 F.2d 400, 408-09 (7th Cir.) (emphasis added) (footnote omitted), *cert. denied*, 439 U.S. 824 (1978). In particular, the YBE and NAACP point to cases in which courts have held states liable due to the participation of state agencies in the development

and concentration of segregated housing within a city. *See, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 426 (8th Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986); *Evans v. Buchanan*, 393 F.Supp. 428, 435, 438 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975); *Oliver v. Kalamazoo Bd. of Educ.*, 368 F.Supp. 143, 183 (W.D. Mich. 1973), *aff'd sub nom., Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

2. *Claims Against the UDC and its Present Director; Statute of Limitations*

The State urges that plaintiffs' claims against the UDC and its present director are barred, as a matter of law, by the statute of limitations. The statute of limitations for actions under both § 1983 and Title VI is that applicable to personal injury actions in the state in which the appropriate federal court sits. In New York, this time period is three years. *See Owens v. Okure*, 488 U.S. 235, 251 (1989) (§ 1983); *Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993) (same), *modified*, 25 F.3d 81 (2d Cir. 1994); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F.Supp. 427, 433 n.4 (S.D.N.Y. 1993) (title VI), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (*per curiam*); *Barcia v. Sitkin*, 89 F.R.D. 382, 385 (S.D.N.Y. 1981) (same). A claim accrues for purposes of the statute of limitations when the discriminatory act occurs and plaintiffs know or have reason to know of it, even though the "most painful" effects of the discrimination may occur later. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)); *Morse v. University of Vermont*, 973 F.2d 122, 125 (2nd Cir. 1992). "The relevant date is when the 'operative decision' to act is made, since it is the decision, rather than the action itself, which is the basis of a discrimination claim." *Mussington*, 824 F.Supp. at 432 (citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (*per curiam*)).

The State urges, and we agree, that any improper operative decisions by the housing defendants in this case occurred by

1972, and certainly by 1975. The UDC's selection of sites for the construction of housing in Yonkers was made pursuant to a Memorandum of Understanding entered into with the City in July 1970 and amended in 1971 and 1972. YBE Exhs. 19-81; 19-113; 19-174. There is no evidence that the UDC's site selection activities after 1972 produced any housing. Moreover, these activities ceased altogether in 1975, when the State bailed out the UDC from fiscal disaster and effectively ended its housing program. YBE Exh. 6-66; YBE Exh. 20-63 at ¶ 10; Tr. 1690-92 (Danielson). Since plaintiffs knew or should have known of the UDC's site selections at the time and did not commence this suit until 1987, we find that their claims against the UDC are barred by the three year statute of limitations.[35]

The YBE and NAACP urge that the statute of limitations is not a bar because the UDC has a continuing obligation to take corrective action to eliminate all vestiges of segregation to which it has contributed. This duty, it is contended, remains in force until all vestiges of segregation in the school system have been eradicated, an event which this Court has already held has not yet occurred. *See* 833 F.Supp. at 225.

We agree, however, with the State that there is no authority for applying a "continuing wrong" theory to the housing defendants here. Although the courts have held some governmental entities to have an affirmative duty to take steps to eliminate the effects of past school segregation and have found a failure to take these steps to be a continuing violation

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[35] The State housing defendants alternatively argue that plaintiff's claims should be barred by the equitable doctrine of laches. We disagree. Defendants assert that they have suffered prejudice by virtue of their absence from the lengthy discovery and trial proceedings involving the liability of the City of Yonkers and the YBE. However, defendants' only significant showing of prejudice is the unavailability of one witness, Frank Kristof, who we find was not the sole repository of any critical testimonial evidence. *See* Tr. 2311-17 (Winnick). As we stated in an earlier opinion, it can be wondered, in light of the voluminous record already compiled at the expense of other parties, whether defendants should view their belated joinder in this litigation as a bane or a blessing. *See United States v. City of Yonkers*, No. 80 Civ. 6761, 1989 WL 88698, at *1 (S.D.N.Y. Aug. 1, 1989).

of the affirmative duty, *see Penick*, 443 U.S. at 458-59; *Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968), this doctrine seems to have been limited only to defendants with an ongoing, pervasive role in matters directly affecting school attendance zoning. *See Richmond v. Croson*, 488 U.S. 469, 524-25 (1989) (Scalia, J., concurring); *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring). The rationale for finding a continuing wrong by school authorities in these cases is that every assignment by school authorities of a minority student to a minority school is a new discriminatory act. *See Palmer v. Board of Educ.*, Nos. 93-3591, 94-1229, 1995 WL 42819, at *4 (7th Cir. Feb. 3, 1995) (Easterbrook, J.). As defendants point out, "[t]here is no evidence, however, that UDC had such power over schools, students, or attendance lines, or assisted the Board in its exercise of such powers." State Post-Trial Brief at 73. Therefore, since the UDC's activities in Yonkers took place within a finite time interval and ceased entirely in 1975, this suit, commenced in 1987, cannot be maintained. We accordingly dismiss the claims against the UDC and its present director.

3. *Housing-Based Claims Against the State Education Defendants*

It remains to be examined, however, whether the actions of the UDC can be imputed to the State education defendants or whether these defendants, acting with knowledge and awareness of Yonkers housing developments, are liable for what they did or failed to do in Yonkers in light of such knowledge. If these defendants are so liable, it is clear that their violations are continuing ones and that the statute of limitations does not apply. *See Penick*, 443 U.S. at 458-59; *Green*, 391 U.S. at 437.

The YBE apparently argues that this Court should impute the actions of the UDC to either the State or to State education officials in order to hold these defendants liable. YBE Post-Trial Brief at 25-26. We disagree. As the State asserts, "[t]he absurdity of the argument is that it would allow the Board to sue the State as liable for the actions of the Board

itself." State Post-Trial Brief at 55. The circumstances under which acts of a subdivision or creation of the state may be imputed to the state or to one of its agencies are far more limited than the YBE suggests. *See Washington*, 458 U.S. at 480-82 (noting that in *Milliken v. Bradley*, 418 U.S. 717 (1974), "the actions of a local school board could not be attributed to the State that had created it."); *Bush v. Viterna*, 795 F.2d 1203, 1206 (5th Cir. 1986) (state commission on jail standards could not be held vicariously liable for acts of county officials in maintenance of jails); *cf. Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 991, 994 (1976) (Powell, J., concurring) (suggesting that school officials cannot be held liable for racial imbalance in the schools which results from the discriminatory housing practices of other governmental actors); *Bell v. Board of Educ.*, 683 F.2d 963, 968 (6th Cir. 1982) (rejecting the argument that "a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies.").

The question would be more difficult if the UDC were an arm or instrumentality of the State, like the SED. As we stated in our previous liability decision:

> It is undisputable that a hypothetical single state agency which controls the operation of, and engages in the racial segregation of, both housing and schools—by confining for racial reasons the city's subsidized housing to one section of the city, while simultaneously adhering to a neighborhood school policy of student assignment—can be held liable for such conduct. It is inconceivable that state action may be fractionalized such that two state agencies could be permitted to collectively engage in precisely the same conduct, yet avoid legal accountability for the identical result.

Yonkers Board, 624 F.Supp. at 1534. However, although created by the State, the UDC is an entity distinct and separate from the State, with substantial operational autonomy. Like a municipality, the UDC is by statute a political subdivision of the State. *See Cine 42nd Street Theater Corp. v. Nederlander Oral. Inc.*, 790 F.2d 1032, 1044, 1047 (2d Cir. 1986). Indeed,

the Second Circuit has already held in this case that "[t]he UDC does not act in a sovereign capacity, and therefore they may not successfully assert the Eleventh Amendment as a defense." *See United States v. Yonkers*, No. 92-6198, slip op. at 3 (2d Cir. Jan. 13, 1993) (citing *Cine 42nd*, 790 F.2d at 1044).

Although the YBE points to cases involving Little Rock, Indianapolis, and Wilmington in which federal courts arguably imputed to state defendants responsibility for school segregation caused in part by the segregative conduct of state-created municipal housing agencies, *see Little Rock Sch. Dist.*, 778 F.2d at 423-27; *Board of Sch. Comm'rs*, 637 F.2d at 1116; *Evans*, 393 F.Supp. at 435, these cases either pre-date *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) or relate to circumstances in which the state itself historically had fostered a dual school system.[36] They do not support YBE's general assertion that state liability for school segregation may be predicated on acts of local subdivisions.

Further, in declining to impute the actions of the UDC to State education officials, we note that the relationship between these parties differed from the relationship that we found to exist between the City of Yonkers and the YBE in our previous liability decision. In that decision, we found that not only was there evidence of intentionally segregative conduct on the part of local school officials, *see Yonkers Board*, 624 F.Supp. at 1533 (distinguishing the situation in Yonkers from that in Bell), but also that any legal separation between the City and the YBE was "artificial and constitutionally

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[36] *Monell* and *Praprotnik* would preclude the vicarious liability under § 1983 of State education officials for the actions of the UDC. Moreover, at least one court has found that there also can be no vicarious liability under Title VI. *See Hodges v. Public Building Comm'n*, 873 F.Supp. 128, 132 (N.D. Ill. 1995); *cf. Springer v. Seaman*, 821 F.2d 871, 881 (1st Cir. 1987) (finding no case addressing the issue of vicarious liability under Title VI). Although the EEOA appears to provide precisely the type of vicarious liability not otherwise imposed under § 1983 and Title VI, *see supra* pp. 59-61, the EEOA does not apply to the actions of the UDC, but only to the actions of "educational agencies" or the state itself.

insignificant" in light of mayoral appointments to the YBE that furthered common segregative objectives. *See* 624 F.Supp. at 1534-35. Here, there is no evidence of segregative conduct on the part of State education officials; moreover, there is no evidence that these officials and the UDC worked together in any concerted manner in pursuit of a common segregative goal.

Therefore, we must address the YBE's other theory of recovery, based on the actions of the UDC, against State education officials. To what extent does the passive response of the Commissioner, the Board of Regents and other State educational officers to Yonkers school segregation create liability because of the fact that the UDC did not vigorously resist, and indeed acquiesced in, segregative Yonkers housing patterns? In other words, does the State education officials' knowledge[37] of the UDC's participation in site selection for Yonkers housing alter our holding, set forth above, that the conduct of these education officials is not actionable under the standard of *Arthur v. Nyquist*. We hold that it does not.

As noted above, *Arthur* held that state officials cannot be held liable for their mere inaction or failure to combat the segregative acts of local officials. 573 F.2d at 146. Without imputing the actions of the UDC to State education officials, which we have already decided would be inappropriate in this case, we do not see how the education officials' knowledge of the UDC's role in Yonkers housing segregation distinguishes these officials from those in *Arthur*. After all, the fact that State education officials knew of the segregative housing practices of Yonkers officials did not make the conduct of the State officials actionable under the *Arthur* standard. Since the UDC is the legal equivalent of a municipality, like Yonkers, *see supra* pp. 70-71, there is no reason to find that the State education officials' knowledge of UDC involvement in these local housing practices tips the *Arthur* balance in favor of a finding of state liability.

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[37] There is evidence that at least some SED staff knew during the mid-to-late 1970's that Yonkers was planning to build subsidized housing in a way that would enhance segregation. Sobel Deposition at 223.

IV.

Conclusion

We thus conclude that the extensive record compiled herein furnishes no basis for the imposition of liability on any State defendant. We reach this conclusion with reluctance for several reasons.

First, we find entirely unpersuasive the argument of the State that it lacked full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools. For example, not to have been aware of the segregative aspects of special education in Yonkers, *see* 624 F.Supp. at 1453-62; 837 F.2d at 1196-97, despite careful scrutiny of Yonkers special education in general, would have required a careful avoidance of such knowledge.

We find similarly unpersuasive the State's contention that it lacked the power to address adequately the problem of school segregation. There is no doubt in our mind that the State possessed the full means and authority needed to deal with Yonkers school segregation, had it been inclined to do so. We conclude that the State determined not to take any affirmative action to deal with Yonkers school segregation because of political and other pressures, from within the Board of Regents and from without, which opposed vigorous desegregation efforts. These pressures can only be explained in racial terms.

However, we find no basis for imposing liability on the State because we find ourselves constrained by the decisional rule set forth in *Arthur v. Nyquist*. As have we, the court in *Arthur* found that the state had the power and duty to address segregation (there, in Buffalo), but nevertheless held that the absence of affirmative participation by the state in local pro-segregative conduct compelled a finding of no-liability. The teaching of *Arthur* is that abdication by the state in discharge of its duty to cause local districts to desegregate does not afford a basis for liability. Able counsel for the YBE and NAACP advance no claim that *Arthur* does not continue to be an accurate statement of the law in this Circuit which is

binding on this Court. Rather, they contend that they have proven a more direct link between State action and school segregation.

In the end, we conclude that the differences between this case and *Arthur* are quantitative, not qualitative. The extent of the State's determination *not* to act vis-a-vis school desegregation in Yonkers and the consequences of that inaction have been fully documented; but no more has been shown. Accordingly, we conclude that the complaint against all the State defendants must be dismissed.

With respect to housing issues, we have found that the UDC acquiesced in the segregative site selections of Yonkers officials. However, any claims against the UDC and its present director are barred by the statute of limitations. Moreover, the actions of the UDC cannot be imputed to the State or to State education officials. Finally, the State education officials' awareness of the housing situation in Yonkers does not alter our analysis of the liability of these officials under *Arthur v. Nyquist*.

As previously noted by this Court, see *United States v. City of Yonkers*, No. 80 Civ. 6761, 1992 WL 176953, at *1-*2 (S.D.N.Y. July 10, 1992), these conclusions do not leave the YBE and NAACP without a remedy to deal with the vestiges of segregation which the Court has found to exist in Yonkers. The City of Yonkers remains liable to deal with the segregation that it has caused in the Yonkers Public Schools.

The parties are to advise the Court in writing within twenty (20) days from the date hereof as to how and when they wish to proceed with the remaining phases of this litigation.

SO ORDERED.

Dated: March 27, 1995
New York, New York

/s/ LEONARD B. SAND
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)
June 14, 1995
HONORABLE LEONARD B. SAND, U.S.D.J.

UNITED STATES OF AMERICA,

Plaintiff,

—and—

YONKERS BRANCH, NAACP, et. al.,

Plaintiff-Intervenors,

—against—

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY, YONKERS BOARD OF EDUCATION,

Defendants,

—and—

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

—and—

THE STATE OF NEW YORK; MARIO CUOMO, as GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L.

BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK; and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

APPEARANCES:

MICHAEL H. SUSSMAN, ESQ.
Attorney for Plaintiff-Intervenors NAACP
25 Main Street
Goshen, N.Y. 10924

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for New York State Defendants
120 Broadway
New York, N.Y. 10271
HARVEY J. GOLUBOCK, ESQ.
HOWARD L. ZWICKEL, ESQ.
MARION R. BUCHBINDER, ESQ.
STEPHEN JACOBY, ESQ.
—Of Counsel—

HOGAN & HARTSON
Attorneys for Yonkers Board of Education of the City of Yonkers
555 13th Street, N.W.
Washington, D.C. 20004-1109
STEVEN J. ROUTH, ESQ.
DANIEL B. KOHRMAN, ESQ.
PAUL A. MINORINI, ESQ.
—Of Counsel—

—and—

ANDERSON BANKS MOORE CURRAN & HOLLIS
61 Smith Avenue, P.O. Box 240
Mt. Kisco, N.Y. 10549
LAWRENCE W. THOMAS, ESQ.
—Of Counsel—

WHITESIDE & FITZPATRICK
Attorneys for CITY OF YONKERS
1929 Third Avenue North
Birmingham, Alabama 35203
RAYMOND P. FITZPATRICK, JR., ESQ.
DAVID P. WHITESIDE, ESQ.
—Of Counsel—

OPINION

SAND, J.

In an Opinion dated March 27, 1995, this Court concluded that the State of New York, the State Board of Regents, and various other State education officials (collectively, "the State"), as well as the Urban Development Corporation, were not liable under 42 U.S.C. § 1983 for the conditions of unlawful *de jure* segregation that the Court had previously found to exist in the Yonkers Public School System. *See United States*

v. Yonkers, 880 F.Supp. 212, 236 (S.D.N.Y. 1995). The Court declined to reach the merits of possible State liability under The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* ("EEOA"), a federal statute that had not been included in the original interpleader complaint against the State nor relied upon by plaintiffs as to any questions of substantive liability. *See* 880 F.Supp. at 238 & n.32, 241. The Court indicated, however, that it would revisit the EEOA issue upon any further application of the parties. *Id.* at 241.

Presently before the Court is just such an application. The Yonkers Board of Education and the Yonkers Branch, NAACP (collectively, "plaintiffs") have moved for leave to amend their complaint to state a claim under the EEOA and for a ruling that the State is liable under the EEOA based on the findings made in the March Opinion. Plaintiffs also move the Court to "supplement" the March Opinion by addressing the merits of their claim of State liability under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"). The State opposes the motion on the grounds that plaintiffs' requests for relief under the EEOA and Title VI are both procedurally barred and meritless.

Having considered the arguments of the parties, as raised both in the motion papers and at oral argument, the Court concludes that plaintiffs are not entitled to prevail on either their EEOA claim or their Title VI claim. Our reasoning is set forth below. In addition, the Court directs the entry of a final judgment consistent with this Opinion pursuant to Fed. R. Civ. P. 54(b), so that the parties may take an immediate appeal on the issue of State liability.[1]

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[1] This is consistent with the request of the parties as expressed at oral argument on plaintiffs' motion on May 25, 1995.

I. The EEOA

A. The Procedural Propriety of Amending the Complaint

The first question before us is whether to grant plaintiffs leave to amend their complaint to state a claim against the State under the EEOA.[2] The parties agree that post-trial requests to amend the pleadings are governed by the twin standards set forth in *Hillburn v. Maher*, 795 F.2d 252 (2d Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987): if the issue raised by a proposed amendment was tried with the express or implied consent of the parties, the amendment must be permitted; if there was no such consent, the amendment may be permitted if the party against whom it is offered would not be prejudiced by it, and the amendment should be granted in the absence of prejudice if "the interests of justice so require." *Id.* at 264. In this case, the question of prejudice concerns the fact that plaintiffs' EEOA claim rests on a theory of vicarious liability that the State claims it cannot now fairly defend against because it did not participate in the original liability proceedings against the City of Yonkers in 1983-84.

Putting the question of consent-to-litigate to one side, we believe that plaintiffs satisfy the second of the *Hillburn* standards. The issue of prejudice was raised by the State prior to trial in early 1994 when plaintiffs served on the State a number of requests for admissions relating to the Court's November, 1985 Opinion on the liability of the City. *See* Added State and UDC Defendants' Responses to the Yonkers Board of Education's Second Requests for Admissions Relating to the Court's Opinion of Nov. 20, 1985 at 3-4. The Court concluded that concerns of due process did not preclude the requested admissions, and the admissions became part of the record to the extent that the State did not seek to refute them. *See* Order of the Court dated April 7, 1994. We see no reason to upset this resolution of the matter at this point in the litigation. We

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[2] The manner in which the EEOA became an issue in this case is set forth in detail in the March Opinion, 880 F.Supp. at 238-41.

note, however, that if we did perceive prejudice in holding the State to the factual findings concerning the City's liability, we would consider whether to allow the State to reopen the record and contest any of the findings deemed admitted against it.

As for the requirements of the "interests of justice," we think that the public interest in a thorough resolution on the merits of a claim is particularly compelling in civil rights litigation such as this. We accordingly grant plaintiffs' motion to amend the complaint to state a claim under the EEOA.

B. The Merits of the EEOA Claim

Section 1703 of the EEOA provides in relevant part that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . . .

42 U.S.C. § 1703. For purposes of section 1703, an "educational agency" can be a local educational entity such as the Yonkers Board of Education. *See* 20 U.S.C. §§ 1720(a), 2891(12), 3381.

The question before us is whether this provision of the EEOA provides a basis for holding a state vicariously liable for the discriminatory acts of local educational authorities. In the March Opinion, we perceived this question to resolve itself into a choice between following the literal and unambiguous language of section 1703, which seemed to impose on states the type of supervisory liability foreclosed under 42 U.S.C. § 1983, and looking beyond section 1703's language to the legislative history of the EEOA, which strongly suggested that Congress did not intend the statute to afford pro-

tections against racial discrimination beyond those already provided under the Fifth and Fourteenth Amendments of the Constitution.[3]

Further reflection on the matter in light of the subsequent briefing and oral argument by the parties has convinced us of several things. First, it does not appear that we are in fact faced with a clear-cut choice between the language of the statute and its legislative history. For one thing, the literal language of section 1703 is not as unambiguous as we initially thought.[4] For another, the internal incongruity of the EEOA's substantive provisions, while not creating ambiguity *per se*, raises serious doubts about what Congress intended to achieve by passing the EEOA.[5] We now believe that the plain

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[3] *See* 880 F.Supp. at 239-41.

[4] The State argues that the introductory phrase "No State shall" in section 1703 is a term of art denoting the general concept of state action and that its inclusion in section 1703 is simply Congress' way of saying that the proscriptions of that provision are to apply to state, but not to private, actors. Though this reading renders section 1703 slightly redundant in style (since the term "educational agency" in section 1703 is already defined to include only public authorities, be they state or local), it is not for that reason implausible. At the very least it calls into question plaintiffs' contention that the phrase "No State shall" is meant to single out the fifty United States, as opposed to state actors in general, for liability for unlawful segregation in the schools, regardless of its cause.

[5] With the exception of section 1703 and certain other provisions relating to jurisdiction and standing to bring suit, the entire statute is devoted to disciplining and limiting the ways in which federal courts may proceed in remedying unlawful school segregation and to identifying and emphasizing those actions and conditions which *do not* constitute denials of equal educational opportunity. Furthermore, Congress' sole expressed purpose in passing the EEOA—to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system," 20 U.S.C. § 1701(b)—has nothing to do with articulating standards of liability for segregation in the first instance, much less with articulating standards that depart from well-established constitutional norms. Though plaintiffs insist there is nothing inherently inconsistent in Congress' deterring certain types of school desegregation efforts by federal courts and agencies on the one hand, and Congress' burdening the states with new, affir-

language and structure of the EEOA prompt enough questions concerning Congress' purpose in enacting section 1703 as would justify recourse to the EEOA's legislative history. *See Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992) (noting that it is particularly appropriate to look beyond the literal meaning of statutory language when the statute "produces an unexpected result and when there is strong reason to doubt that Congress intended that result"). And, as even plaintiffs appear to concede, the legislative history supports the State's position more than their own.[6]

More important still, however, is our recognition that the relevance of the EEOA to this case does not turn in the first instance on whether section 1703 was intended to provide a basis for vicarious state liability in desegregation cases. Rather, assuming *arguendo* that it was so intended, the key question is whether the State can be forced to participate in a remedial scheme that is now ten years old and that was neither devised nor implemented with the prescriptions and priorities of the EEOA in mind.

As several courts have recognized, the EEOA does not so much purport to limit the ultimate remedial powers of the courts in desegregation cases as it tries to ensure that courts impose certain vigorous remedies (such as the compulsory transportation of students) only as a last resort, after due and explicit consideration of more moderate alternatives. *See, e.g., Morgan v. Kerrigan*, 530 F.2d 401, 412-13 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). For example, section 1713 of the EEOA lists and prioritizes a set of remedial options that a court must consider and make specific findings upon *before*

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mative duties of discrimination prevention on the other hand, we think the tension between these aims is clear.

[6] *See* Plaintiffs' Reply Memorandum in Support of the Yonkers Branch, NAACP's and the Yonkers Board of Education's Motion for Leave to Amend Pleadings and for Supplementation of the Court's Opinion of March 27, 1995 at 22-23; Yonkers Board of Education's Supplemental Brief in Response to the Court's Order of February 28, 1995 on the Equal Education Opportunities Act at 5.

it proceeds to formulate a remedy that "involve[s] directly or indirectly the transportation of students . . . ." 20 U.S.C. § 1713. Similarly, section 1755 of the EEOA provides that no court may order the implementation of any plan to remedy a finding of *de jure* segregation which involves the transportation of students *unless* it first finds that "all alternative remedies are inadequate." 20 U.S.C. § 1755.

The remedial plan that was devised ten years ago for the Yonkers school system, to which the State would become a party if found liable at this stage of the proceedings, utilizes, albeit to a minimal degree, mandatory busing. Although at the time it was the working assumption of both the Yonkers Board of Education and the Court that mandatory busing was necessary to the achievement of a constitutionally-adequate remedy for Yonkers, the Court never made (nor was requested to make) specific findings regarding the efficacy of remedies other than busing.

We do not think it would be consistent with Congress' intent in adopting the EEOA to require the State to participate in a remedial plan that does not comport with the requirements of a statute applied retroactively to it. Nor do we think it would be sound, from any perspective, to reopen at this late stage in these proceedings questions relating to the proper scope of a remedial plan adopted and implemented a decade ago. Regardless of whether the State can be held vicariously liable as a matter of law under section 1703 of the EEOA, we conclude that it cannot lawfully be made to participate in the remedial plan now in place in Yonkers. The State therefore cannot be held accountable under the EEOA in this case.[7]

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[7] Section 1716 of the EEOA, which provides that a desegregation plan need not comply with the standards set forth in the EEOA as long as the plan is voluntarily proposed by the "appropriate educational agency," does not disturb our holding. "Voluntary," to our mind, means a willingness to do something in light of all the material facts bearing upon the particular decision. Because the Court's obligations under the EEOA were not an issue in the initial liability and remedy proceedings involving the City of Yonkers ten years ago, we cannot conclude that the Yonkers Board of Education "voluntarily proposed" the remedial plan

II. Title VI

A. The Procedural Propriety of Supplementation

Plaintiffs ask us to "supplement" the March Opinion by including a decision on the merits of their Title VI claim. We see no reason to deny the request. The Title VI claim is one that plaintiffs pleaded early on, including it in their complaint against the State. The claim was not addressed on its merits in the March Opinion, not because it was not procedurally before the Court, but because it was not the subject of focused attention by the parties. The procedural bars that the State raises against supplementation—Rule 59(e), Fed. R. Civ. P., and Local Rule 3(j)—are not relevant. The 10-day time limit of Rule 59(e) begins to run only upon "entry of the judgment"; and the March Opinion, which among other things invited the parties to make further application to the Court within 20 days of its issuance, *see* 880 F.Supp. at 217, 245, does not constitute a "judgment." *See* Fed. R. Civ. P. 58. Local Rule 3(j) applies by its express terms only to a court's determination of an original "motion," not to judicial findings of fact and conclusions of law following a bench trial. We will accordingly proceed to address the merits of plaintiffs' Title VI claim against the State.

B. The Merits of the Title VI Claim

Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

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now in place when in good faith it designed a set of desegregation steps that incorporated mandatory busing in response to the Court's orders.

Plaintiffs argue that when read in light of its language, purpose, legislative history, and implementing regulations, Title VI provides a basis for holding the State liable for its failure to prevent the unlawful conditions of racial segregation in the Yonkers schools. In particular, plaintiffs argue that when a recipient of federal funds (such as the State of New York) distributes the funds or otherwise arranges for them to flow to some other agency (such as the Yonkers Board of Education), the recipient assumes an affirmative obligation to ensure that the agency complies with the dictates of Title VI and uses those funds in a non-discriminatory manner. On this argument, Title VI does not merely require a recipient of federal funds to refrain from doing wrong itself; it requires a recipient to actively restrain the wrongdoing of those entities or agents to whom it conveys the use of federal monies.

We would begin by noting that there is nothing implausible in this reading of Title VI as such. Title VI was enacted as Spending Clause legislation, which means that it rests on the power of Congress to set the terms on which federal financial assistance will be made available to state and local governments and private actors. *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 598-99 (1983) (White, J. joined by Rehnquist, J.). Surely one option that Congress might have wished to extend to potential state recipients was that of policing the local uses of federal funds in exchange for receiving the funds in the first instance and enjoying some discretion in distributing them.

That said, we must recognize plaintiffs' construction of Title VI for what it is—an argument that the statute imposes on states liability for failing to ensure that local governments receiving federal flow-through funds do not discriminate on the basis of race. Although this supposed liability is not "vicarious" in the strictest sense (since it is based on a duty that is separate and distinct from the primary duty not to discriminate), it would clearly render a state legally responsible for racial discrimination that the state itself did not intentionally contribute to or cause.

The question before us is whether Title VI imposes this type of "quasi-vicarious" liability. The most relevant authority on this point is *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983). In *Guardians*, a majority of the Court reaffirmed the conclusion of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 328, 352 (1978), that liability under Title VI is coextensive with liability under the Equal Protection Clause of the Fourteenth Amendment. *See Guardians*, 463 U.S. at 610-11 (Part II of concurring opinion of Powell, Rehnquist, JJ., and Burger, C.J.); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 639-42 (Stevens, Brennan, and Blackmun, JJ., dissenting). "In view of the clear legislative intent," the *Bakke* majority had written, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke*, 438 U.S. at 287 (opinion of Powell, J.). *See also United States v. Fordice*, 112 S.Ct. 2727, 2737 n.7 (1992) (more recently stating that Title VI's protections extend no further than the Fourteenth Amendment). We therefore must look to constitutional standards to determine the reach of Title VI in this case.

It is well-established that the Equal Protection Clause prohibits only intentional or purposeful discrimination. *Washington v. Davis*, 426 U.S. 229, 238-42 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205, 208, 212-13 (1973) (finding, in the schools context, that only *de jure* segregation, or "a current condition of segregation resulting from intentional state action," was constitutionally impermissible and the proper predicate for enforced remedial action). This means that the discriminatory effect of a law or a condition of segregation offends the Constitution only if it can be said to result from a discriminatory state purpose. *Washington*, 426 U.S. at 240.

In this case, acts of intentional racial discrimination have undoubtedly been found, but they have been found only on the part of local Yonkers officials, not on the part of the State defendants. *See* 880 F.Supp. at 236, 245. This is important,

because the discriminatory state purpose that must exist before a violation of the Equal Protection Clause can be found is a form of intent, and intent—be it measured by a subjective standard, an objective standard, or a blend of the two—inheres in actors, not in situations or conditions. In our view, a state no more "intentionally" fosters racial segregation by failing to prevent local acts of intentional segregation than it "intentionally" fosters racial segregation by failing to alter adventitious housing patterns—in other words, it does not unconstitutionally discriminate in either instance. *See Hart v. Community School Board*, 512 F.2d 37, 47-51 (2d Cir. 1975) (explicating the intent-to-discriminate requirement under the Constitution and assuming that "mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation"); *Arthur v. Nyquist*, 573 F.2d 134, 143 (2d Cir.) (concluding that the test for discriminatory intent fashioned in *Hart* remains valid in the wake of the Supreme Court's decision in *Washington v. Davis*), *cert. denied*, 439 U.S. 860 (1978).[8]

Because a state's failure to prevent local acts of segregation, without more, does not offend the Constitution, we conclude, on the authority of *Bakke* and *Guardians*, that the

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[8] Our conclusion draws heavily on our inquiry in the March Opinion into the scope of the State's liability under 42 U.S.C. § 1983. And for good reason. Although we recognize that section 1983 is in some ways a "peculiar" statute, in that it contains a state action requirement and a requirement that the tort-feasor be a "person," we see little basis for concluding that it contains a standard of discriminatory intent different from the standard enunciated in the cases interpreting the Constitution directly, such as *Washington* and *Keyes*. Certainly *Arthur v. Nyquist*, the Second Circuit case interpreting the Constitution's discriminatory-intent requirement through the prism of section 1983, did not indicate that there was any difference in the standards. Nor do we readily see how a state actor could be found not to have "subject[ed], or caus[ed] to be subjected" a complainant to racial discrimination (the test under section 1983) and yet at the same time be found to have undertaken action with an intent to produce a condition of racial segregation (the test under *Washington* and *Keyes*).

State's conduct vis-a-vis the Yonkers public schools does not offend Title VI. We accordingly reject plaintiffs' argument that the language, purpose, and legislative history of Title VI compel a finding of State liability under that statute.

Still to be considered are the implications of the Title VI regulations. For although one majority of the *Guardians* Court accepted the principle that Title VI reaches no further than the Constitution in terms of the protections it affords, another majority of the *Guardians* Court was persuaded that Title VI permits the enactment of implementing regulations that do go beyond the Constitution. *See Guardians*, 463 U.S. at 591-93 (White, J.); *id.* at 617-24 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Specifically, a majority of the Justices in *Guardians* held that although Title VI itself does not prohibit the use of federal funds in programs that have a disparate impact on racial minorities, administrative regulations passed pursuant to Title VI could legitimately incorporate an "impact" or "effects" standard. The question before us would thus seem to be whether Title VI's implementing regulations provide a basis for holding a state recipient of federal financial assistance liable for the racially discriminatory acts of local subrecipients

We hold that they do not, for several reasons. The first has to do with the manner in which plaintiffs have presented the question to the Court. Plaintiffs ask us to read Title VI in light of its implementing regulations. That is, they ask us to use the regulations as a tool of interpretation, furnishing a perspective with which one is to read Title VI in order to ascertain its true meaning.[9] Consistently with this approach, plaintiffs have

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[9] Title VI's regulations, say plaintiffs, "represent 'early interpretations of the statute by the agencies charged with enforcement,' [and] should be accepted as embodying a proper reading of Title VI 'absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history.' " Plaintiffs' Memorandum in Support of the Yonkers Branch, NAACP's and the Yonkers Board of Education's Motion for Leave to Amend Pleadings and for Supplementation of the Court's Opinion of March 27, 1995 at 29 (quoting

never alleged any claim under the Title VI regulations *per se*. Rather, they continue to invoke only the statute itself.

The problem is that it is unclear whether the type of interpretive inquiry urged by plaintiffs is open to us. The majority of the *Guardians* court that agreed to look to Title VI's regulations for guidance on the disparate-impact issue failed to make clear whether they believed the regulations were of the "interpretive" variety (*i.e.*, regulations that merely inform a court's interpretation of a statute), or of the "legislative" variety (*i.e.*, regulations that are passed by agencies pursuant to delegated law-making authority and that have the force of law binding upon the courts). *See generally National Latino Media Coalition v. F.C.C.*, 816 F.2d 785, 787-88 (D.C. Cir. 1987) (analyzing the differences between the two types of agency regulations).[10] The distinction matters in the follow-

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Guardians, 463 U.S. at 592 (White, J.)). *See also* Plaintiffs' Letter to the Court Dated May 22, 1995 at 1 ("We submit that . . . the Title VI implementing regulations should be considered and deferred to in interpreting Title VI, absent a clear conflict with the statutory language . . . .).

[10] Some of the members of the *Guardians* majority that relied on the Title VI regulations used language and argued from standards that are more characteristic of interpretative regulations than of legislative regulations. For example, both Justices White and Marshall framed the issue in terms of deferring to the construction of Title VI as contained in its regulations. Both focused on the timing and consistency of the agencies' position that Title VI prohibited disparate impact, as well as on the expertise of the administrators involved in fashioning the regulations. See *Guardians*, 463 U.S. at 592-93 (White, J.); *id.* at 618-23 (Marshall, J., dissenting). As the Supreme Court has recognized, timing, consistency, and agency expertise are all factors that courts traditionally consider in judging the authoritativeness of interpretative regulations. *See Batterton v. Francis*, 432 U.S. 416, 424-25 & n.9 (1977).

Justices Stevens, Brennan, and Blackmun, on the other hand, focused on Congress' delegation of law-making power to the agencies charged with the distribution of federal financial aid, and they invoked the "reasonable relation test" set forth in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), which is used to assess the validity of legislative regulations. *See Guardians*, 463 U.S. at 643 (Stevens, Brennan, and Blackmun, JJ., dissenting). Justice O'Connor, although of

ing sense: if the *Guardians* majority understood the Title VI regulations to be interpretive, we could accept plaintiffs' invitation to read Title VI through its regulations and determine whether the statute, as glossed, provides for an outcome not required by the statute alone. If, however, the *Guardians* majority understood the regulations to be legislative, we would regard the regulations as law, related to but independent of the statute, and we would look to the regulations themselves to decide the issue before us. Yet here a further difficulty arises because, as noted above, plaintiffs have not pleaded the regulations as an independent cause of action.

All of this uncertainty is arguably enough to deny plaintiffs' motion. However, even if we were to assume that we can treat Title VI's implementing regulations as interpretive, and revisit Title VI's meaning through their prism, we do not believe that the regulations provide a concrete enough basis for holding the State liable for the racial discrimination in the Yonkers schools.

To begin with, the Title VI regulations are not nearly as specific on the issue of vicarious liability as they are on the issue of disparate impact. For example, 34 C.F.R. § 100.3(b)(2) (Department of Education), one of regulations at issue in *Guardians*, addresses the question of disparate impact in the following straightforward manner:

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the view that the Title VI regulations could not reach beyond the statute itself, nonetheless assumed that the regulations were legislative in nature. *See id.*, 463 U.S. at 613-15 (O'Connor, J., concurring in the judgment).

There are suggestions in cases decided after *Guardians* that Title VI's implementing regulations are legislative in nature, and that a party must rely on those regulations independently of the statute itself. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 293 (1985) (noting that *Guardians* held that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI"); *Association of Mexican-American Educ. v. California*, 836 F.Supp. 1534, 1546-48 (N.D. Cal. 1993) (following *Guardians* and considering whether there is a private right of action under the Title VI regulations incorporating a disparate impact standard).

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program . . . *may not*, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(emphases added). In contrast, the regulations cited by plaintiffs as a basis for imposing vicarious state liability provide, in pertinent part:

> A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin [,] [discriminate in the administration of the services, financial aid, or benefits provided under the program].

34 C.F.R. § 100.3(b)(1) (Department of Education).

> The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient . . .) . . . .

34 C.F.R. § 100.13(g) (Department of Education). We agree with plaintiffs that the most natural reading of these latter two regulations is that they forbid recipients of federal financial assistance from discriminating indirectly, through third parties, as well as directly by their own hand. But indirect

discrimination is not necessarily the same thing as vicarious or quasi-vicarious discrimination. If it were, it would be difficult to understand the many cases interpreting section 1983 (under which there is no vicarious liability) which hold that a state actor may subject a person to a violation of his rights by creating a custom or policy under which third parties commit unconstitutional acts. *See, e.g., Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986).

Plaintiffs also rely on a set of Title VI regulations that require the states to be administratively involved in monitoring the use of federal funds. For example, both 28 C.F.R. § 42.105(d) (Department of Justice) and 34 C.F.R. § 100.4(b) (Department of Education) require state recipients of continuing federal financial assistance to give assurances that programs receiving assistance are conducted in a nondiscriminatory manner, and to provide for such methods of administration of the programs as to assure federal authorities that the state recipient and its subrecipients are complying with Title VI. Another regulation, 34 C.F.R. Part 100, Appendix B(II)(B) (Department of Education), requires that the state agency responsible for the administration of vocational education programs adopt a compliance program to prevent, identify, and remedy racial discrimination on the part of its subrecipients. Among other things, this compliance program must include periodic reviews of selected subrecipients. Upon a finding of unlawful discrimination, the state agency must notify the subrecipient of steps it needs to take to get into compliance with Title VI, and the state agency must attempt to obtain voluntary compliance.

There is no denying that regulations such as these indicate a determination on the part of federal authorities to get states involved in the policing of federal funds. But in our view, state-level oversight responsibilities in and of themselves can serve purposes—such as administrative efficiency—having little to do with a concern to apportion ultimate legal responsibility for violations of Title VI. We recognize that the implementing regulations as a whole, and the regulations

establishing procedures for investigating and sanctioning Title VI violations, in particular, seem more concerned with the bare fact of a violation of Title VI than with the identity of the violator as such. *See*, *e.g.*, 34 C.F.R. § 100.8(a) (Department of Education) (noting simply that "[i]f there appears to be a failure or threatened failure to comply with this regulation, and if the non-compliance or threatened noncompliance cannot be corrected by informal means, compliance . . . may be effected by the suspension or termination of . . . Federal financial assistance or by any other means authorized by law"). We believe, however, that if the Title VI regulations are to reach beyond Title VI itself, as *Guardians* says they may, they must do so by way of something more definite than what can be gleaned through suggestion and inference.

In sum, because it is unclear how we are to take cognizance of the Title VI regulations, because one of those ways is foreclosed by the posture of plaintiffs' pleadings, and because we do not find the regulations definite enough to impose vicarious liability, we deny plaintiffs' Title VI claim against the State.

Conclusion

For the foregoing reasons, plaintiffs' motion for a ruling that the State is liable under the EEOA and/or Title VI is denied. The Court finds that there is no just reason to delay entry of a final judgment on plaintiffs' claims against the State, and accordingly directs the entry of a final judgment dismissing all claims against the State defendants pursuant to Fed. R. Civ. P. 54(b).[11]

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[11] The alternative to entry of a Rule 54(b) order would be to compel plaintiffs to proceed with the remedy phase of these proceedings against the City of Yonkers itself. Prior holdings of this Court have already established that the City is liable and that vestiges of segregation remain in the Yonkers public school system. *See* 880 F.Supp. at 245. Plaintiffs have disclaimed any interest in proceeding at this time solely against the City and this Court will defer to that preference, which of

SO ORDERED.

Dated: June 14, 1995
New York, New York

/s/ LEONARD B. SAND
Leonard B. Sand
U.S.D.J.

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course involves political and economic ramifications which the parties are better able than the Court to assess.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No.: 95-6182
Filed: January 13, 1997

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13 day of January one thousand nine hundred and ninety-seven.

USA,

Plaintiff,

—v.—

YONKERS BOARD,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellees The State of New York.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /s/ ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiffs,

—and—

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et. al.,

Plaintiffs-Intervenors,

—v.—

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants,

—and—

YONKERS BOARD OF EDUCATION,

Cross-Claimant,

—v.—

THE STATE OF NEW YORK;

THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE SCLAFINI, MIMI LEVIN LIEBER,

SHIRLEY C. BROWN, NORMA GLUCK, THOMAS R. FREY, and JAMES MCCABE, SR., in their official capacities as members of the Board of Regents;

THE DEPARTMENT OF EDUCATION of the State of New York;

THOMAS SOBOL, in his official capacity as Commissioner of Education of the State of New York;

MARIO CUOMO, in his official capacity as Governor of the State of New York;

—and—

THE URBAN DEVELOPMENT CORPORATION of the State of New York and VINCENT TESE, as Director of the Urban Development Corporation,

Cross-Defendants.

CROSS-CLAIM OF THE YONKERS BOARD OF EDUCATION

Preliminary Statement

1. On November 20, 1985, this Court found that Yonkers and its public school system were intentionally segregated by race, and that the Yonkers Board of Education ("Yonkers Board") and the City of Yonkers ("City") were jointly liable for racial segregation in the Yonkers public schools. 624 F.Supp. 1276 (S.D.N.Y.). Subsequently, and pursuant to the Order of this Court, the Yonkers Board proposed an "education improvement plan" ("EIP" or the "Plan"). The Plan was adopted and ordered by this Court, with certain modifications, on May 13, 1986.

2. The actions and inactions of the State of New York and the other cross-defendants have played a significant role in creating and maintaining the racial segregation in Yonkers which led to the 1985 decision of this Court. In addition, the

cross-defendants have failed and refused to fulfill their responsibility to help a alleviate such segregation and its effects, despite requests for assistance from the Yonkers Board. Such participation by the cross-defendants is necessary in order to achieve long-term, effective desegregation in the Yonkers Public Schools. Accordingly, the Yonkers Board brings this claim for declaratory and injunctive relief in order to fulfill its statutory and constitutional obligations to operate its school system free of the effects of racial segregation as found by this Court. This cross-claim seeks this Court's judgment and order requiring cross-defendants to participate in the implementation and funding of the Plan as modified or extended by the Court to include remedial and other educational measures necessary to achieve a system of public education in the City of Yonkers which meets federal and state constitutional requirements.

Jurisdiction

3. This cross-claim arises under 42 U.S.C. §§ 1981, 1983, 1985, 1988 and 2000d; the Thirteenth and Fourteenth Amendments to the Constitution of the United States; and Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause). This Court has jurisdiction over the parties and the subject matter of this Cross-Claim under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, and 2202.

Parties

4. Cross-claimant Yonkers Board of Education ("Yonkers Board") is a municipal corporation established under the laws of New York State and subject to the control of the New York State Board of Regents and the Commissioner of Education. The Yonkers Board is an agent of the State of New York, is charged with the responsibility of providing education to public school children in the City of Yonkers, and is fiscally

dependent upon the State of New York and the City to fund the operation, maintenance, and facilities of the Yonkers Public Schools. *See* New York Constitution Article V, Section 4; N.Y. Educ. Law, §§ 305, 2551, 2554, 3602, and 3602a (McKinney 1981). This Court, by its November 20, 1985 decision, has found that the Yonkers Public Schools are "racially segregated" and "unequal in the quality of educational opportunity afforded to students in the schools," and that the Yonkers Board "is liable for the racial segregation of Yonkers' public schools." 624 F. Supp. at 1530, 1537.

5. Cross-defendant State of New York ("State") is entrusted and vested with the central responsibility for education in New York State. The legislature of cross-defendant State of New York is required under Article XI, Section 1 of the New York State Constitution to provide for the maintenance and support of the system of free common schools wherein all the children of the State may be educated. The educational program for all the children of the State of New York must comport with the requirements of the United States Constitution and the Constitution of the State of New York. The State receives and has received federal financial assistance for education and for desegregation-related activities.

6. Cross-defendants Martin C. Barell, R. Carlos Carballada, Adelaide L. Sanford, Willard A. Genrich, Emlyn I. Griffith, Jorge L. Batista, Lora Bradley Chodos, Louise P. Matteoni, Edward Meyer, Floyd S. Linton, Salvatore J. Sclafini, Mimi Levin Lieber, Shirley C. Brown, Norma Gluck, Thomas R. Frey, and James W. McCabe, Sr., are sued in their official capacities as members of the Board of Regents ("State Board"). The State Board is the head of the cross-defendant Department of Education, and its members have the authority to appoint and remove the Cross-defendant Commissioner of Education. The State Board is responsible for exercising legislative functions concerning the State's educational system, for determining its educational policies, and for establishing rules for carrying into effect the laws and policies of the state

relating to education. New York State Constitution, Article V, Section 4, N.Y. Educ. Law § 207 (McKinney 1981).

7. Cross-defendant Thomas Sobol is sued in his official capacity as Commissioner of Education of the State ("Commissioner"). Under New York law, the Commissioner is the Chief Executive Officer of the system of public education in New York State, and the Chief Administrative Officer of the Department of Education. The Commissioner has the responsibility for supervising all public schools in New York and for advising and guiding the school officers of all school districts, including Yonkers, as to their duties and as to the management of their respective school systems. The Commissioner has the power, *inter alia*, to enforce general and specific laws relating to the educational system and the rules of the Board of Regents, to hear complaints and to institute proceedings concerning racial segregation, to issue desegregation orders, to redraw district lines, and to withhold state funds from any school system which willfully disobeys any provision of law or any decision, order or regulation of the Commissioner of Education. N.Y Educ. Law §§ 305, 306, 308, 309, and 310, (McKinney 1981).

8. Cross-defendant Mario Cuomo (the "Governor") is sued in his official capacity as Governor and Chief Executive Officer of the State of New York. Pursuant to Article VII, Sections 1 and 2 of the New York Constitution, the Governor has the responsibility to include in his annual budget sufficient funds for providing for a public system of education in the State of New York which comports with federal and state constitutional requirements. The cross-defendants described in Paragraphs 5-8 above will be referred to collectively as the "Education Cross-Defendants".

9. Cross-defendant Urban Development Corporation ("UDC"), was established under Chapter 174 of the Laws of New York, 1968, by the New York State Legislature, and was charged with the responsibility, *inter alia*, of increasing the availability of dwelling accommodations for persons and fam-

ilies of low income. At the time of the events described below, the UDC had the power to override local zoning requirements to carry out its responsibilities. N.Y. Unconsol. Laws §§ 6254, 6265 and 6266. Cross-defendant Vincent Tese is sued in his official capacity as director of the UDC.

Factual Allegations

10. In its remedial order dated May 13, 1986, this Court retained jurisdiction to enforce the terms of its Order and "for all purposes consistent with attaining the objectives of this Order." In ordering the implementation of the Plan, this Court directed the Yonkers Board to advise the Court if for any reason it was unable to implement the Plan because of lack of adequate funding. 635 F. Supp. at 1553, 1551.

11. Pursuant to this Court's order, the Yonkers Board has worked to implement the Plan. This experience has revealed the necessity for additional educational improvements in order to achieve effective and *lasting* desegregation in Yonkers. For example, as the Yonkers Board has begun to integrate minority schoolchildren, some of whom have significant educational needs, into previously all-white classrooms, it has become apparent that additional remedial education, staff training, and teacher resources are needed in older to make desegregation work.

12. Education in New York, including desegregation and the provision of equal educational opportunity, is a state function for which the State and its agencies are responsible. For example, Cross-defendant Board, in a policy statement issued in 1960, urged the desegregation of New York State's public schools. In 1963, Cross-defendant Commissioner called upon educators in the State of New York to act firmly and with all possible speed to eliminate segregation, *de jure* or *de facto*, in the public schools of the State of New York. In that same year, Cross-defendant Commissioner requested all school

boards in New York State to notify the Department of Education of those schools in their respective systems having a black enrollment exceeding 50%, and the State Education Department issued guidelines for desegregation of the public schools. *See* 624 F. Supp. at 1468.

13. The Education Cross-defendants have long been aware of school segregation in Yonkers. In 1969, for example, Cross-defendant Commissioner identified the Yonkers school system as one of the most racially isolated school systems in the State.

14. Notwithstanding the responsibilities of the Cross-defendants and their recognition of school segregation in Yonkers, the Cross-defendants have contributed to such segregation and have injured the Yonkers Board and its schoolchildren through a continuing pattern of actions and failures to act. As discussed further below, this pattern has included, *inter alia*: a) enacting a 1969 statute, later found to be unconstitutional, which intentionally limited and discouraged desegregation efforts throughout the State, including Yonkers (¶¶ 15-22); b) impairing and discouraging desegregation and encouraging segregation throughout the State, including Yonkers, through other legislative and administrative actions (¶¶ 23-30); c) impeding desegregation efforts in Yonkers specifically through funding limitations and other conduct (¶¶ 31-38); and d) sponsoring segregated subsidized housing in Yonkers which contributed to school segregation (¶¶ 39-43).

State enactment of legislation impeding school desegregation

15. In 1969, the State enacted a law which prohibited State education officials and appointed school boards, including the Yonkers Board, from assigning students or establishing, reorganizing or maintaining school districts, school zones or

attendance units for the purpose of achieving racial equality in attendance. Chapter 342 of the Laws of 1969, Education Law § 3201, ¶ 2.

16. The enactment of Chapter 342 of the Laws of 1969 was a clear and unambiguous attempt by the State to thwart efforts by local school systems to eliminate racial imbalance in the schools.

17. The statute was enacted despite objections from school districts, including the Yonkers Board, and despite express reservations as to its constitutionality.

18. The statute, by prohibiting the implementation of plans designed to alleviate racial imbalance in school systems such as Yonkers, created a single exception to the broad supervisory powers of the State Commissioner of Education over local public education.

19. The statute created a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools, all in violation of the Fourteenth Amendment.

20. Although the statute was determined to be a violation of the Fourteenth Amendment by the United States Supreme Court in 1971, no action was subsequently taken by the State to repeal or modify the statute since that time and the unconstitutional statute continues to be part of the New York State education laws.

21. The statute had the effect of slowing affirmative efforts within the State to reduce racial segregation.

22. The statute was intended to have and did have the effect of continuing segregation in the schools in New York State and of significantly encouraging and involving the State of New York in racial discrimination.

State conduct impeding State desegregation efforts and discouraging desegregation in Yonkers

23. Upon information and belief, in addition to the adoption of Chapter 342 of the Laws of 1969, the State Legislature took direct and indirect action to limit and impede efforts of the State Board, the Commissioner, the New York State Department of Education, and local school districts, including Yonkers, to achieve integration in the public schools of the State of New York. Such action included, *inter alia*: (a) adopting a joint resolution calling for a federal constitutional convention to amend the United States Constitution to ban the reassignment of students on the basis of race to achieve integration; (b) even after Chapter 342 was declared unconstitutional, enacting another law (subsequently vetoed by the Governor) which sought to impose a moratorium on reassignment of students to achieve racial balance, and was no different in substance from Chapter 342; (c) instituting a policy of interviewing candidates for appointment and reappointment to the Board in order to ascertain the candidates' views on busing to achieve racial integration and selecting as Regents only those candidates who were opposed to busing; (d) denying renewal of appointments to the Board to certain regents who had supported busing to achieve racial integration in the public schools; (e) refusing to adopt legislation proposed by the Commissioner and by a State-appointed commission to facilitate school district reorganization where necessary to remedy school segregation; (f) maintaining the status of Yonkers and other districts as fiscally dependent districts, despite the recommendation of the Commissioner that such status be changed because it impeded effective desegregation; (g) refusing to take any action to implement the recommendations of a State-appointed commission that many school districts in the State, including Yonkers, should be compelled by the legislature to desegregate their schools; and (h) eliminating the State Education Department's Racial Balance Fund over the objections of the Commissioner.

24. In 1969, Ewald B. Nyquist was appointed Commissioner' of Education by the State Board. Upon information and belief, Commissioner Nyquist during his term of office sought to pursue affirmative measures to eliminate segregation in the public schools including, where indicated, the reassignment or busing of students to accomplish racial integration.

25. On November 19, 1976, the State Board terminated Ewald B. Nyquist as the Commissioner of Education. Upon information and belief, one reason for his termination was his strong policy of promoting affirmative measures, including busing where indicated, for integration of public schools in the State of New York.

26. Upon information and belief, following the termination of Commissioner Nyquist, there have been few, if any, orders issued by the Commissioner's Office for racial integration of the respective school districts, whereas previously the Commissioner of Education in implementing the State Board's policy issued such integration orders.

27. Upon information and belief, members of the State Board took other action, in addition to the termination of Commissioner Nyquist, which limited and impeded efforts to achieve integration in the public schools of the State of New York. Such actions included, *inter alia*, adopting policy statements and otherwise seeking to interfere with and discourage desegregation enforcement efforts by the Commissioner during the 1970s.

28. Upon information and belief, the aforestated actions and conduct had a chilling effect on the initiation of programs and plans for racial integration of the public schools in the State of New York, including the Yonkers Board.

29. Upon information and belief, the aforestated actions and conduct encouraged and fostered opposition by local public officials and local school boards to racial integration, including the opposition of local public officials in Yonkers.

30. The State itself has recognized the negative effects of many of the aforesaid actions and conduct. In 1969, the Governor and the State Board created the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, known as the Fleischmann Commission. Among its other responsibilities, the Fleischmann Commission was charged with studying the problems caused by years of discrimination and segregation in New York schools. In its 1972 report, among its other conclusions, the Fleischmann Commission severely criticized the State's conduct in enacting Chapter 342, in eliminating the Racial Balance Fund, in providing inadequate funding even when the Fund was in existence, and in refusing to accept the legislation proposed by the Commissioner in 1970 to facilitate desegregative school district reorganization. The Fleischmann Commission specifically concluded that such conduct contributed to the failure of the public schools in New York to make satisfactory progress towards racial integration.

Additional State conduct limiting school desegregation in Yonkers

31. By resolution dated May 28, 1970, the Yonkers Board instructed the Yonkers Superintendent of Schools to work with the State Education Department in formulating plans to ameliorate the problem of racial imbalance in the Yonkers public schools. Part of the basis for this Court's finding of liability against the Yonkers Board was the Board's failure to take effective action in 1970-71 to fully develop and implement such plans. At the same time, however, the Education Cross-defendants also failed to take such action with respect to school desegregation in Yonkers, despite the fact that they had participated with Yonkers school officials in designing proposed desegregation efforts, were aware of school segregation in Yonkers, and had the authority and responsibility to take action. In fact, the Education Cross-defendants elimi-

nated the one source of State funding for even the modest desegregation efforts underway in Yonkers by cutting off funding for the Racial Balance Fund in 1972.

32. In 1975, the Yonkers Board advised the Commissioner of Education that the Yonkers school district had undertaken a project to reduce minority group isolation in the Yonkers public schools and that a task force for quality education had been created to integrate the public schools. By resolution of the Yonkers Board adopted October 9, 1975, the task force for quality education was established to develop an integration plan; at the same time, the Yonkers Board sought funding to finance the position of "planning coordinator" and to obtain resources and staff from the State Education Department to implement the plan to reduce racial segregation in the Yonkers public schools.

33. Despite its continuing knowledge of the problem of racial isolation in Yonkers, and despite the fact that the City of Yonkers was suffering from severe financial difficulties and a fiscal crisis which culminated in the Emergency Financial Control Act of 1976, Chapter 488, Laws of 1976, the State Education Department did not make available the limited funding requested by the Yonkers Board for formulating a plan of integration.

34. In 1976-77, the Emergency Fiscal Control Board, controlled by the State, required the Board to implement an additional $9.7 million in budget reductions. This State-approved reduction, which was in addition to 1975-76 City-imposed budget cuts of approximately $6 million, represented approximately half of the City's total budget deficit.

35. These budget cuts had the effect of imposing on the school system a greater than *pro rata* share of the City's financial difficulties. This further limited the ability of the Yonkers Board, which in 1975 was balancing fiscal and desegregation priorities, to undertake effective desegregation efforts.

36. Notwithstanding the negative impact of these actions and their recognition of the continuing problem of racial imbalance in the Yonkers public schools, the Education Cross-defendants repeatedly denied requests by the Yonkers Board for financial assistance to continue Yonkers' efforts to promote equal educational opportunity, except for one small grant in 1976, and did not provide for any supplemental funding to ameliorate or reduce the effects of the financial constraints imposed by the Emergency Fiscal Control Act of 1975.

37. After 1976, and even after this Court's order of May 13, 1986, the Education Cross-defendants have continued to deny requests by the Yonkers Board for assistance to implement effective desegregation efforts.

38. From at least 1969 through the present, with knowledge of school segregation in Yonkers and of the Yonkers Board's actions and inactions with regard to desegregation, the cross-defendants failed to take any effective action to promote desegregation in Yonkers, and continued to encourage and perpetuate the segregated structure of education as found by this Court in the Yonkers Public Schools.

State sponsorship of segregated subsidized housing in Yonkers

39. This Court has previously found that the City of Yonkers was a state actor in unlawfully contributing to a condition of racial segregation in housing in the Yonkers community, which segregation in turn had a segregative impact on the Yonkers public schools. 624 F. Supp. at 1534, 1542-45.

40. This Court has previously determined that the Urban Development Corporation contributed to the creation and maintenance of 1,800 units of segregated subsidized housing. 624 F. Supp. at 1313-14.

41. This Court specifically found that despite its authority to override local zoning laws and its initial preference for scattered-site housing, UDC deferred completely to the City's views as to site selection and, in cooperation with the City, sponsored approximately 1,800 units of segregated subsidized housing in racially isolated southwest Yonkers. *See* 624 F. Supp. at 1317-27.

42. The Yonkers Board specifically objected to this segregative placement of the UDC-sponsored subsidized housing.

43. UDC sponsorship of the approximately 1,800 housing units in racially isolated southwest Yonkers exacerbated residential and school segregation in the City of Yonkers and further contributed to the isolation of minority citizens in Yonkers.

Claim for Relief

44. As a result of the conduct complained of in paragraphs 1 to 43 above, the vestiges of segregation persist today in the Yonkers public schools. Notwithstanding the desegregation plan approved in this Court's Order dated May 13, 1986, and the Yonkers Board's efforts to implement that plan, additional measures are necessary to achieve stable, effective school desegregation in Yonkers.

45. As described above, the cross-defendants named herein and their predecessors and instrumentalities have denied and deprived the Yonkers Board and the schoolchildren of Yonkers of their federal and State constitutional and legal rights, privileges and immunities, as follows: (a) by such conduct as terminating the sole source of State funds to assist districts seeking to remedy racial isolation, enacting Chapter 342, and appointing and removing members of the State Board on the basis of their attitude toward busing, cross-defendants encouraged segregation and impeded the efforts of those Yonkers officials who sought to remedy the unconsti-

tutional segregation found by this Court; (b) by such conduct as failing to assist the Yonkers Board in its voluntary desegregation efforts, continuing to fund regular education programs in Yonkers, and failing to take any affirmative action to alleviate school segregation in Yonkers, despite their authority and responsibility to do so, cross-defendants intentionally tolerated, condoned, supported, and perpetuated the school segregation in Yonkers found by this Court, with full knowledge of the consequences of their actions; (c) by sponsoring segregated subsidized housing, by acceding to Yonkers officials' choices of sites for subsidized housing it knew to be segregated, and by declining to exercise its power to override local zoning ordinances to create integrated housing, cross-defendant UDC was a full participant in the illegal segregation of 1800 housing units in Yonkers, contributing to school segregation.

46. The conduct of the cross-defendants as described above has injured the Yonkers Board by impairing its ability to educate Yonkers' students effectively and by impeding its ability to fulfill its constitutional obligations to operate a school system free from racial discrimination and its effects.

47. The conduct of the cross-defendants as described above has violated the equal protection guarantees and prohibitions against discrimination of the Thirteenth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1981, 1983, 1985, 1988 and 2000d, and has violated Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause).

Prayer For Relief

WHEREFORE, Cross-Claimant Yonkers Board respectfully requests that this Court:

a. Enter an order pursuant to 28 U.S.C. § 22C1 declaring that Cross-Defendants and their predecessors created, main-

tained, continue to perpetuate, and have failed to fulfill their affirmative obligations to dismantle the racially dual system of public education in the City of Yonkers and all its vestiges and effects as found by this Court, in violation of the Constitution of the United States and federal law;

b. Enter an order requiring the Cross-Defendants identified herein, their successors in office, agents, employees, and all persons in active concert or participation with them, to cease their illegal and unconstitutional conduct and to help implement and fund a plan to correct the violations referred to above. The Cross-Defendants should be ordered to participate in the existing plan, and in educational programs over and above those previously ordered, which are necessary to eradicate the effects of segregation found by this Court in the Yonkers Public Schools to the maximum extent practicable and as soon as possible;

c. Enter an order pursuant to 42 U.S.C. § 1988 allowing Cross-Claimant its costs and reasonable attorneys' fees in prosecuting this Cross-Claim; and

d. Grant such other and further relief as this Court finds just and proper.

Respectfully submitted,

/s/ MAURICE CURRAN

Maurice Curran
Lawrence W. Thomas
Anderson, Banks, Moore,
Curran & Hollis
61 Smith Avenue, P.O. Box 240
Mount Kisco, New York 10549
David S. Tatel
Elliot M. Mincberg
Anne T. Goldstein
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004
Counsel for the School Board of
the City of Yonkers, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

—and—

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

—vs.—

CITY OF YONKERS, YONKERS COMMUNITY DEVELOPMENT AGENCY: YONKERS BOARD OF EDUCATION,

Defendants,

—and—

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

—and—

THE STATE OF NEW YORK; MARIO CUOMO, as GOVERNOR OF THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; MARTIN C. BARELL, R. CARLOS CARBALLADA, ADELAIDE L. SANFORD, WILLARD A. GENRICH, EMLYN I. GRIFFITH, JORGE L. BATTISTA, LORA BRADLEY CHODOS, LOUISE P. MATTEONI, EDWARD MEYER, FLOYD S. LINTON, SALVADORE

SCLAFINI, MIMI LEVIN LIEBER, SHIRLEY C. BROWN, NORMA GLUCK, THOMAS FREY and JAMES MCCABE, SR., in their official capacities as members of the State Board of Regents; THE DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; THOMAS SOBOL, as COMMISSIONER OF EDUCATION IN THE STATE OF NEW YORK and THE URBAN DEVELOPMENT CORPORATION of the STATE OF NEW YORK and VINCENT TESE, as Director of the Urban Development Corporation,

Added-Defendants.

SECOND AMENDED COMPLAINT

I. *PRELIMINARY STATEMENT*

1. On July 1, 1981, this court granted the plaintiff intervenors' Motion to Intervene in this lawsuit as against defendants City of Yonkers, Yonkers Community Development Agency and Yonkers Board of Education (hereinafter local defendants or City or YBE).

2. In February 1982, this court granted plaintiff-intervenors leave under F.R.Civ.P. 15 to file their Amended Complaint adding defendants United States Department of Housing and Urban Development and Secretary Samuel Pierce as parties hereto.[1]

3. Plaintiff-Intervenors expressly incorporate paragraphs 1-36 of their Complaint and 37-59 of their First Amended Complaint as if fully re-written herein.

4. On November 20, 1985, after lengthy proceedings, this court held local defendants liable for violating the constitu-

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[1] Attached hereto are Intervenors' Complaint of March 1981 and their Amended Complaint of December 1981; leave to file the latter was granted in February 1982.

tional rights of intervenors and the class of minority persons they represent by intentionally fostering racial segregation both in the residential and schooling patterns of the City of Yonkers. Specifically, local defendants were held jointly liable for creating a condition of racial segregation in the city's public schools. *See*, 624 F.Supp. 1276 (S.D.N.Y. 1985). The City was found liable for fostering housing segregation.

5. As demonstrated by proofs offered at trial, the actions and inactions of the State of New York, through its several agencies and instrumentalities responsible for education and housing contributed to the creation and perpetuation of unlawful racial segregation in Yonkers.

6. Though cognizant of such racial segregation, proposed added-defendants and their predecessors in office failed to discharge their legal duty to eliminate such segregation and its effects. Instead, through acts and omissions more fully detailed below, proposed added-defendants exacerbated such segregation.

7. In so acting and omitting to act, proposed added state defendants violated the constitutional rights of members of intervenors' class and should now be required, after appropriate proceedings, to participate in the remedy of such violations.

II. *JURISDICTION*

8. This second amended complaint arises under 42 U.S.C. 1981, 1988 and 2000d; the Fourteenth Amendment to the Constitution of the United States and Article VI, Clause 2 of the United States Constitution. This district court has jurisdiction over proposed added state defendants and the subject matter through 28 U.S.C. secs. 1331(a), 1343(3) and (4), 2201 and 2202.

III. *PARTIES*

9. Plaintiff-Intervenors Yonkers Branch, NAACP, et. al. are (a) a civil rights organization chartered by the national office of the NAACP specifically, *inter alia*, "to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights . . . [and] to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof . . . ". Constitution of the NAACP, Article II, Statement of Objectives, and (b) the class of minority persons residing in Yonkers attending or eligible to attend its public schools and residing in or eligible to reside in assisted housing. This court has previously granted this class legal standing herein and recognized this as a class action. It has also recognized the organizational standing of the local Branch of the NAACP to pursue the organizational objectives outlined above.

10. Added-defendant State of New York ("State" hereafter) has constitutional and statutory responsibility for public education in the State of New York. The State of New York must insure that each school district complies with the requirements of the United States Constitution and the Constitution of the State of New York. The State both receives and distributes federal funds for educational and desegregation-related purposes. It also allocates substantial sums for the purpose of assisting local school districts like Yonkers.

11. Added-defendant Mario Cuomo (the "Governor" hereafter) is sued in his official capacity as Chief Executive Officer of the State of New York, a position he has held since January 1983. Under Article VII, Sections 1 and 2 of the New York Constitution, the Governor must include in each annual state budget funds sufficient to provide for a lawfully operated system of public education in the State of New York.

12. Added-defendants Barell, Carballada, Sanford, Genrich, Griffith, Batista, Chodos, Matteoni, Meyer, Linton,

Sclafini, Lieber, Brown, Gluck, Frey and McCabe, Sr., are sued in their official capacities as members of the State Board of Regents ("State Board" hereafter). The State Board directs the State Department of Education. Its members appoint and remove the Commissioner of Education and are authorized to exercise legislative functions concerning the State's educational system. The State Board also determines and announces educational policies for local school districts and establishes rules and regulations for enforcing state policies in the area of education.

13. Added-defendant Thomas Sobol is sued in his official capacity as Commissioner of Education of the State of New York ("Commissioner" hereafter). Appointed by the State Board, the Commissioner serves as the Chief Executive Officer for the system of public education in the state. He also administers and is responsible for the Department of Education. Along with this latter agency, the Commissioner supervises all public schools in New York and advises local school officers, including those in Yonkers, with respect to their duties under state law and regulation. The Commissioner has the specific power to enforce laws relating to the educational system and the rules and regulations of the State Board. Particularly, the Commissioner may issue desegregation orders; re-draw district lines and withhold state and federal funds from any school district which willfully disobeys any provision of state law or any decision, order or regulation of the Commissioner.

14. Added-defendant Urban Development Corporation ("UDC" hereafter) was created in 1968 by act of the State Legislature. Among its responsibilities was the provision of housing for those of limited means in a non-segregative manner. To this end, the UDC was granted the power to over-ride local zoning laws.

15. Added-defendant Vincent Tese is sued in his official capacity as Director of the UDC.

IV. *FACTUAL AVERMENTS*

15 The State; the State Board and its members and the Commissioner are responsible for education throughout the State of New York.

16. In 1960, the State Board issued a policy statement urging the desegregation of New York State's public schools. In 1963, then Commissioner James Allen directed education leaders to eliminate segregation, however caused, from the public schools. That same year, he requested school boards to identify those schools having a black enrollment in excess of 50% and to develop plans to integrate same. At the same time, the Education Department issued guidelines for the desegregation of the state's s public schools.

17. Added-defendants, acting in their supervisory authority over local school districts, became aware of school segregation in Yonkers in the 1960's.

18. Despite this awareness, the added-defendants have taken no action to require Yonkers to comply with state mandates and federal law with regard to school segregation.

19. Instead, through a series of acts and omissions as outlined below, added-defendants have encouraged the maintenance of segregated schools in Yonkers; withheld support at those rare moments that Yonkers' officials have sought state assistance in remedying extant school segregation and failed to enforce state and federal requirements as against Yonkers.

20. In 1969, New York State enacted Chapter 342, Education Law sec. 3201 Para. 2. This enactment prohibited state educational officials and appointed local school boards, including Yonkers', from assigning students or establishing, organizing or maintaining school districts, school zones or attendance lines for the purpose of achieving racial balance.

21. This legislation intentionally created a racial classification, removing from local school boards a power tradi-

tionally within their authority, thus making it more difficult for such school districts to ameliorate racial imbalance in public schools, in violation of the Fourteenth Amendment.

22. Chapter 342 was intended by the State legislature to impede and thwart both the efforts of the State Commissioner and the Board of Regents and those of local school districts in redressing racial imbalance and unequal educational opportunity.

23. After adopting Chapter 342, the State Legislature took other actions to impede and thwart state and local efforts to achieve racial balance and integration. Such actions created and contributed to a public atmosphere hostile to racial integration, thus making it more difficult for even well-intended local school districts to address the issue of racial imbalance and segregation.

24. Specifically, the State Legislature (a) adopted a joint resolution calling for a constitutional convention to bar the re-assignment of students to achieve racial integration; (b) sought to re-vitalize the unconstitutional Chapter 342 by passing legislation imposing a moratorium on the reassignment of students to achieve racial balance; (c) instituted a policy and custom of interviewing candidates for appointment and reappointment to the State Board so as to ascertain each candidates' view on busing to achieve racial integration and then selecting only those who stated their opposition to busing; (d) denied reappointment to certain State Board members who had supported busing as a means of achieving racial integration; (e) failed to adopt legislation proposed by the Commissioner and a state-appointed commission to facilitate school district reorganization when necessary to remedy school segregation; (f) maintained the status of Yonkers as a fiscally dependent school district, despite the recommendation of the Commissioner that such status be changed, in part because its continuation impeded desegregation; (g) failed to implement the recommendations of a State-appointed commission that many school districts, including Yonkers, should

be compelled to desegregate their public schools and (h) over the objection of the Commissioner, eliminated the State Education Department's Racial Balance Fund.

25. Under the strong influence of the State legislature and in large part because of his advocacy of school desegregation, in November 1976, the State Board discharged Ewald B. Nyquist as Commissioner of Education.

26. While Dr. Nyquist had sought to continue state enforcement actions, following his termination, there have been few orders issued by the Commissioner requiring racial integration of school districts.

27. This policy of "non-interference" in local school districts has been implemented with the support of the majority of the Board of Regents. That Board has issued policy statements since 1970 which have effectively removed state pressure upon local school districts to adopt desegregative measures and have assured, on the contrary, that the state would not act to insure desegregation or equal educational opportunity.

28. With specific regard to Yonkers, responding to state direction, in May 1970, the Yonkers School Board instructed its Superintendent to work with the State Education Department to formulate plans to lessen racial imbalance in its schools.

29. Shortly thereafter, representatives of the State Education Department learned that Yonkers would not implement any effort to ameliorate racial imbalance in part because of the racially-predicated public opposition to any such steps.

30. In fact, Yonkers initiated minimal actions to curb racial imbalance and such imbalance worsened through the 1970's.

30. In the fall of 1975, the Yonkers Board advised the Commissioner of Education that it had created a Task Force for Quality Education to study minority group isolation and to recommend means of correcting this condition. The

Yonkers Board of Education sought both financial and technical assistance from the State Department in this effort.

31. Despite knowledge of the condition of racial segregation in Yonkers' schools, the State Department of Education failed to provide such assistance to Yonkers.

32. In 1977 and 1978, Yonkers officials refused to implement either the recommendations of the Task Force for Quality Education or those of its own Superintendent, Joseph P. Robitaille. The Yonkers Board failed to act in part for racial reasons and did not adopt any alternative to these recommendations which would have ameliorated the extant racial imbalance.

33. Notwithstanding its knowledge of the ongoing racial segregation in Yonkers and its own responsibility to supervise and insure the lawful operation of local school districts, the State, acting through the Commissioner and the State Board, took no actions against the Yonkers Board of Education.

34. On information and belief, between 1976 and the present, Yonkers officials have requested specific desegregation related assistance from the state education leaders. This has not been forthcoming.

35. In part because of the failure of the State; the Commissioner and the State Board and its members to take responsible action in light of their collective knowledge of racial segregation in Yonkers, members of the plaintiff-intervenors' class and the Yonkers Branch, NAACP and its members suffered racial segregation and unequal educational opportunity.

36. Such failures to act on the part of state educational officials were and continue to be motivated by their collective desire to placate political forces opposed to racial integration and, in this manner, these state actors have adopted the pernicious racial motivations of those opposed to state action to curb impermissible, state-sponsored segregation.

37. Through the persistent pattern of failure to act in discharge of state duties, the state defendants substantially contributed to both the creation and maintenance of racial segregation and unequal educational opportunity for members of intervenors' class.

38. Added-defendant Urban Development Corporation sponsored some 1800 units of assisted housing in southwest Yonkers between 1970-1975.

39. In the process of assisting City of Yonkers' officials in the provision of such housing, officers and agents of the UDC learned:

(a) of the profound racially-based opposition to the provision of assisted housing outside areas of minority residential concentration;

(b) of the complicity of local political officials with this racially-based opposition and

(c) of the numerous suitable sites for the location of such assisted housing *outside* areas of minority concentration.

40. Notwithstanding the purposes of the UDC, which included the provision of assisted housing in a non-segregative manner, and its statutorily-granted power to override local zoning ordinances, the UDC in Yonkers:

(a) specifically renounced its own authority to override local zoning barriers;

(b) acceded full control of the site selection process to local officials themselves beholden to racial politics;

(c) complied with the segregative site selections made by these local officials, despite full knowledge of their predictably segregative impacts and

(d) provided state and federal monies to such housing projects. thereby making same feasible of construction,

41. The effects of the UDC's actions were highly segregative and this contributed to both residential and school segregation in Yonkers.

42. UDC officials acted with full knowledge of the predictable effects of their contribution to Yonkers and willfully assisted Yonkers' municipal officials in the expansion and extension of racial segregation.

43. Since 1975, New York State has adopted several programs to assist in the provision of subsidized housing. Each of these programs favors the allocation of state resources in a manner which further exacerbates the segregation of low-income and minority families and disfavors the provision of new housing opportunities in an integrative manner.

44. Since 1975, the State has taken no action to remedy the housing and school segregation caused by the actions set forth above.

V. *CAUSES OF ACTION*

45. By the actions described above, the added state defendants have intentionally violated the constitutional rights of minority citizens and residents of Yonkers, New York, contributing to the racial segregation of that City's neighborhoods and schools, and denying to them equal protection under the law.

46. By the omissions described above, the added state defendants have intentionally failed to discharge their supervisory obligations in a manner consistent with the laws of the State of New York and the Constitution of the United States and its laws. Such failures have been motivated, in large measure, by racial prejudice and the desire of state officials to placate majority sentiment. Such omissions have caused increasing racial segregation and unequal educational opportunity in violation of the Fourteenth Amendment to the Constitution.

VI. *PRAYER FOR RELIEF*

WHEREFORE, plaintiff-intervenors pray that this court:

(a) Enter an order pursuant to 28 U.S.C. sec. 2201 declaring that added state defendants and their predecessors created, maintained, perpetuated and have failed to discharge their affirmative obligation to dismantle the racially dual system of public education in the City of Yonkers and its vestiges and effects, in violation of the Constitution of the United States and federal law;

(b) Enter an order pursuant to 28 U.S.C. sec. 2201 declaring that added state defendants UDC and Tese and his predecessors created and perpetuated residential segregation in the City of Yonkers which remains unremedied by the affirmative acts of the State of New York, the UDC or any other state agency or instrumentality;

(c) Enter an order enjoining these added state defendants; their successors in office, agents, employees, assigns and all others acting in concert with them, to cease their unlawful acts and to assist in the implementation of plans to remedy the unconstitutional and illegal segregation in the City of Yonkers and the continued effects of unconstitutional and illegal school segregation;

(d) Enter an order pursuant to 42 U.S.C. sec. 1988 permitting plaintiff-intervenors to recover the costs and reasonable attorneys' fees arising from this action and

(e) Grant such other and further relief as this court deems just and proper.

Respectfully submitted

/s/ MICHAEL H. SUSSMAN
Michael H. Sussman
Sussman & Sussman
30 South Broadway
Suite 418
Yonkers, New York 10701
(914) 968-4558

/s/ GROVER C. HANKINS by BHV
Grover C. Hankins
General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Md. 21215
(301) 358-8900

Counsel for Plaintiff-Intervenors

JOURNAL OF A MEETING OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

HELD AT THE STATE EDUCATION BUILDING, ALBANY, JANUARY 27-28, 1960

* * *

REGENTS STATEMENT ON INTERCULTURAL RELATIONS IN EDUCATION

After the Supreme Court decision of May 1954, we have all been a part in reevaluating the role of education in a democracy. It was of greatest significance that the Court in its historic decision stated:

> "We must consider public education in the light of its full development and its present place in American life throughout the nation. . . .
>
> "Today, education is perhaps the most important function of state and local governments . . . it is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . .
>
> ". . . to separate (them) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ."

The State of New York has long held the principle that equal educational opportunity for all children, without regard

to differences in economic, national, religious or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

In seeking to provide effective education for all the children of this State, boards of education are faced with many obstacles in the form of complex social and community problems. Among them is the existence of residential segregation which leads to schools with students predominantly of one race on the elementary and high school levels.

In spite of these and other difficulties, the Regents are determined to accept this challenge facing our schools today. We charge the Regents Advisory Council on Intercultural Relation in Education, working in close cooperation with the State Education Department, to assist in seeking solutions to the educational aspects of the problem. The council's recommendations for action, based on systematic and objective study, will be reported to the Regents in due course.

We recognize that we who have been given the responsibility for the education of the children and youth in our State can deal directly with only these educational aspects. There are larger community problems which influence the quality of education in, and the ethnic composition of our schools. So

long as these larger social problems remain unsolved, it will be difficult to solve some of the basic and related educational situations. For this reason, therefore, we call upon all our citizens and their agencies of government and their civic organizations to take concrete steps to provide the social climate which will make it possible for us to increase the effectiveness of education. Only with this cooperation will we be able to provide that type of democratic education which will enable all children to contribute their understanding, knowledge and skills to increase the greatness of our State and our Nation.

* * *

REGENTS STATEMENT ON RACIAL INTEGRATION OF SCHOOLS

Regent Jovanovich moved the adoption of the following statement, which was seconded by Regent Griffith and approved by the members of the Board:*

Our statement of January 22, 1975 clearly indicates that it is made "in support and in addition to" our statement of policy on October 25, 1974.

We understand that *de jure* segregation is not at issue: it is unconstitutional.

We also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

To determine compliance with Regents policy on integration principally by use of quantitative measures is to use a method which itself offers no assurance that the educational opportunity of each child is protected.

Recourse to quantitative measures is not the sole or necessarily the principal method for determining and maintaining school integration or for detecting and correcting school segregation. There are other ways to measure whether or not a school district makes serious efforts to bring about integration of schools.

The Regents commit themselves to the following principles:

• The Regents affirm our conviction that equal opportunity for high quality education is the right of every pupil in the public schools of this State, regardless of race, creed, or color.

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* Regents Clark and Klein voted in the negative and Regent Genrich abstained.

• The Regents expect every school district to take those steps necessary to enable every pupil to enjoy that primary right, and to provide appropriate appeal procedures for aggrieved pupils and parents.

• The Regents believe that integrated schools are essential to assure that primary right to all pupils residing in racially diverse communities. We define an integrated school as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportional to it, and in which the programs, facilities. and equipment are not racially identifiable. What constitutes a reflection of the population of a school district will depend upon the circumstances in specific situations.

• The Regents believe that appropriate means to achieve high quality education for all pupils include, where feasible. strategic location of new schools or closing of unneeded schools or both, optional transfer programs and open enrollment, expansion of magnet and specialized schools, compensatory education programs, curriculums which enhance interracial understanding, recruitment of qualified faculty from varied racial and ethnic backgrounds, equalization of State aid to school districts, alteration of school attendance zones where necessary, and in some instances, the judicious and reasonable transportation of pupils with due consideration that the health, safety, and access to high quality education of pupils are not imperiled and with particular consideration that children of elementary school age are not transported for more than moderate distances.

• The Regents believe that racial integration in public schools does not necessitate uniform proportions of pupils, by race or ethnic background in all schools in a district. No single factor—whether it be quality of programs, or competence of staff, or adequacy of facilities or racial or ethnic balance—is alone sufficient to assure that the right of every pupil to high quality education in an integrated school will be

realized. The reference to "serious effort" in our statement of January 22, 1975 speaks to a combination of these factors without sole reliance on any one method of integration or on any one measure of judging integration.

* * *

A REPORT ON THE EDUCATION DEPARTMENT'S SCHOOL DESEGREGATION EFFORTS OVER THE PAST THREE YEARS

Introduction

The Education Department operates an ongoing program in school desegregation which places major emphasis on providing equality of educational opportunity for all students in the public schools of New York State.

Desegregation activities in this area are administered by the Division of Intercultural Relations, a technical assistance unit whose primary functions are:

- Developing, implementing and monitoring desegregation plans.
- Assisting districts to reduce minority-group isolation through Commissioner's Orders, Court Orders, Federal Government Orders, and voluntary means.
- Assisting school districts to meet desegregation-related needs.
- Assisting districts to eliminate sex bias and sex-role stereotyping.
- Assisting districts to comply with Title IX of the Education Admendments of 1972.
- Assisting districts to identify outside funding sources for desegregation-related purposes.
- Assisting school districts to resolve racial/ethnic conflict.
- Assisting districts to develop multicultural curricula.
- Training teachers and administrators in acquiring effective skills for providing educational equity.

- Assisting districts to resolve problems that are occasioned by resegregation.
- Investigating complaints of discrimination in education.

The Department makes every effort to comply with the Regents' Policy Statement of February 20, 1975, which defined an integrated school "as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportionate to it. . . ." To that end, desegregation-related activities conducted by the Education Department have allowed each school district maximum flexibility so that it can provide the best education possible, while at the same time taking special note of those criteria for integration described in the Regents' February 1975 Statement.

Desegregation-related activities have also been consistent with other Regents' Position Papers in that the Department makes every effort to work cooperatively with school-district officials and with citizens of desegregating communities to make maximum use of voluntary initiatives and to build local plans. This report provides information about the nature and results of desegregation-related activities during the period 1977-80 by showing the degree to which minority-group isolation has been reduced in those school districts where the Department has been involved in desegregation-related activities and also the extent of other activities associated with desegregation during this period.

Changes in the Number of Minority-Isolated Buildings

For the purposes of this report, a school building in which the minority-group percentage deviates 20% or more from the district's minority-group racial/ethnic percentage is considered a minority-isolated building. While no statement identifies the 20% deviation as the standard for New York State,

the Department uses the figure as an indicator because of the following factors:

- U.S. District Court Judge John T. Curtin allowed an average 22.5% deviation in Buffalo.
- The Commissioner's Order in Newburgh allowed a deviation of more than 18% for two schools with special problems.
- The Syracuse desegregation order mandated a minority-group enrollment percentage of between 15% and 45% for each school.

We have concluded that the 20% or better deviation for minority-student enrollment provides a reasonable assessment of the extent of minority-group isolation reduction in the schools and districts.

School districts discussed in this report are those in which there has been some type of Department activity associated with a desegregation-related problem or need. The services performed in these districts are consistent with both State and Federal priorities and guidelines. Table 1 shows the statistical factors that relate to minority-group isolation in the various districts on a building-by-building basis from 1977-78 through 1979-80. It shows that declining enrollment and student reassignment have often been used to reduce minority-group isolation in the 27 districts identified. In these 27 districts, 20 buildings have been closed. The figures show that in 1977-78 there were 552 buildings in these districts of which 172 were considered minority-isolated buildings. However, in 1979-80, there were 532 buildings in these districts, of which 139 were minority-isolated. In addition to the 20 buildings that were closed, minority-group isolation was eliminated in 37 of those buildings that remained opened.

Thus, 31% of the buildings in those 27 districts were considered minority-group isolated buildings in 1977-78, and this figure was reduced to 22.6% in 1979-80. This represents an 8.4% reduction in minority-group isolation for the buildings

in the 27 school districts in which the Education Department has performed desegregation-related activity between the 1977-78 and 1979-80 school years.

Table 2 shows the student enrollment factors in the districts where there was desegregation-related activity. Seventy-six percent of the minority-group students within this State attend schools in the "big five" cities of New York City, Buffalo, Rochester, Syracuse and Yonkers. During the period covered by this report, the enrollment of students in these schools declined by 32,690. Of these, 5,573 (or 17%) were minority-group students, while 27,117 were not members of minority groups. This constitutes an 8% enrollment decline in these districts, of which minority students represent only 1% . Thus, the minority-group isolation among students is also reflected in the fact that the building level concentration of minority-group students remained low in spite of the fact that white student enrollment declined at a rate of 6 to 1 compared to that of minority-group students.

To better understand the comprehensive scope of the Department's desegregation-related activities, one must understand that the needs of these districts have been occasioned by special factors that place them in selected categories, namely:

- Districts currently implementing desegregation plans.
- Previously desegregated districts dealing with resegregation.
- Districts implementing voluntary desegregation plans.
- Districts implementing voluntary urban/suburban interdistrict transfer programs.
- Districts desegregating through magnet schools.
- Districts in which a Commissioner's 310 hearing has been held.
- Districts receiving special assistance or in special circumstances.

- Districts receiving assistance in resolving racial/ethnic conflict.
- Districts targeted for voluntary action in 1981-82.

In order to provide the necessary services that are mandated by this greatly expanded program, the Education Department was required to expand its capacity to meet-desegregation-related needs.

For example, for the 1976-77 school year, the Division of Intercultural Relations received $169,000 in Federal funding and maintained a staff of seven professionals and four-secretaries for its one program in Race Desegregation. For the 1979-80 school year, the Division received $1,000,000 in Federal funding with a staff of fifteen professionals and six secretaries for its five programs, of which two were in Race Desegregation. Additional programs in Intercultural Arts, Women's Educational Equity, Desegregation-Related Attitude Assessment, and Educational Equity for Minority Group Women have been planned for the 1981-82 school year, and Federal funding applications for these programs either have been submitted or are being prepared accordingly.

In order to be more responsive to the special needs occasioned by desegregation-related activities in New York City, a member of the Division of Intercultural Relations staff has been assigned full-time to the New York City area. For the first time in the history of the Education Department, in 1979, examinations were given to the staff of the Division of Intercultural Relations providing staff members with an opportunity to acquire permanent civil service status in the same manner that has prevailed for other employees in the Department. The former Bureau of Educational Integration was upgraded to the Division of Intercultural Relations in 1979, and the Bureau Chiefs position was reclassified to that of Division Administrator. The new Division of Intercultural Relations was assigned to the Office of the Assistant Commissioner for ESC Educational Planning and Support Services with the Commissioner's statement that "the integration and

desegregation activities in the Division of Intercultural Relations require the support of planning, research, and evaluation capabilities in elementary and secondary education. To insure this support is available on a continuing basis, the reorganized Division of Intercultural Relations will report directly to the Assistant Commissioner for Elementary, Secondary, and Continuing Education Planning and Support Services."

Other Desegregation-Related Activities

Table 3 shows the type of desegregation efforts which the Department has used in each of the 27 districts. This is important because of the nature in which Department activities in desegregation are funded. For example:

1. Title IV funding in Race Desegregation is used to provide technical assistance to school districts upon their request. The guidelines restrict the Title IV effort to twelve areas of authorized activities. Funding from this source is also made available for the Race Desegregation Assistance Center at Columbia University for providing the same types of services that are provided by the Division of Intercultural Relations. This report addresses itself only to those activities that have been conducted by the Education Department.

2. Emergency School Aid Act funding is also made available to assist districts in the areas of planning, assessing needs, technical assistance and staff training. The major focus of this program is voluntary desegregation. While this funding is not made available to the Desegregation Assistance Center, it is available for local school districts to perform the same services that, in other cases, are performed by the Education Department. This report shows only those activities that have been conducted by the Education Department.

3. State Purposes funding for the Division is not restricted to any types of activities. However, this funding, which goes directly to the Division of Intercultural Relations, is somewhat less than 12% of the Division's funding for conducting desegregation-related activities. Therefore, these activities, while adhering to Regents and Commissioner's directives, must also show a high degree of consistency with Federal desegregation guidelines and regulations. To the extent that Federal guidelines mandate a request from a school district before assistance can be provided, the Department's desegregation efforts are somewhat restricted.

Anticipations for the Future

The Department's 1981-82 desegregation plans have identified 21 districts in which 128 buildings have been targeted as those in which minority-group isolation should be reduced. A funding proposal for $500,000 has been submitted to the Federal government under the Emergency School Aid Act to begin this program on July 1, 1981.

January 19, 1981.

Table 1

Changes in the Number of Minority Isolated School Buildings*
in School Districts Receiving Departmental Desegregation Assistance 1977-78 and 1979-80

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
Pough-keepsie	8	3	7	0	–3	X	X	X					
Buffalo	87	47	82	30	–17	X	X	X	X		X	X	X
Rochester	68	36	64	29	–7		X		X				X
Glen Cove	7	0	7	0	0						X		
Uniondale	8	2	8	3	+1					X			
Freeport	8	0	8	0	0		X	X				X	X

* A minority isolated school building is one which deviates 20% or greater from the district average. Figures are derived from Basic Education Data (BEDS) reported to the Department by districts.

Table 1 (continued)

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
Baldwin	13	1	13	1	0	X		X					X
Malverne	4	0	4	0	0					X		X	
Rockville Centre	8	1	8	0	–1	X		X				X	
Long Beach	8	0	8	0	0								X
Westbury	6	1	6	0	–1			X					X
CSD #18	18	17	18	16	–1	X			X			X	
CSD #21	29	3	29	3	0				X				
Mark Twain JHS	1	0	1	0	0		X				X		

	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
DISTRICT	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
CSD #25	29	2	29	1	–1				X		X		
Andrew Jackson SHS	1	1	1	1	0				X	X		X	
CSD #29**	28	20	28	22	–2						X**		
Staten Island	48	9	48	9	0				X				X
Niagara Falls	21	1	20	1	0	X		X		X			X
Syracuse	38	6	38	4	–2	X	X	X				X	
Newburgh	19	5	17	1	–4	X	X	X				X	
Huntington	9	0	8	0	0	X						X	

** Not counted in the Federal Court tabulation.

Table 1 (continued)

DISTRICT	MINORITY ISOLATED BUILDINGS					ACTIVITIES RELATED TO CHANGE					BASIS FOR ACTION		
	1977-78		1979-80										
	Total Bldgs.	Minority Isolated	Total Bldgs.	Minority Isolated	Net Change	Re-zoning	Magnet School	School Closing	Interdis. Transfer	Other	Fed. Court Order	Comm. Order	Vol Deseg.
Mt. Vernon	14	9	14	10	+1	X	X	X				X	
New Rochelle	13	3	13	2	–1	X		X			X		
White Plains	15	1	12	1	0	X		X					
Yonkers	38	4	35	5	+1			X			X		
Ossining	6	0	6	0	0	X		X					X
TOTAL	552	172	532	139	–37						6	10	11

Table 2

Student Enrollment Factors in Districts Receiving Departmental Desegregation Assistance 1977-78 and 1979-80

	STUDENT ENROLLMENT FACTORS				ENROLLMENT DECLINE		
	1977-78		1979-80				
DISTRICT	Total	Minority %	Total	Minority %	Minority	Other	Total
Poughkeepsie	4356	47.7	3980	53.3	+44	–420	–376
Buffalo	53699	45.7	49565	46.5	–1514	–2620	–4234
Rochester	39639	46.0	35301	47.6	–1410	–2928	–4338
Glen Cove	4055	10.4	3551	10.5	–49	–455	–504
Uniondale	6234	33.0	5938	45.5	+647	–943	–296
Freeport	7794	45.6	7354	48.0	–20	–420	–440
Baldwin	7282	4.7	6575	7.4	+144	–851	–707
Malverne	2553	48.4	2348	49.7	–70	–135	–205
Rockville Centre	4010	5.4	3755	6.1	+13	–268	–255
Long Beach	5646	21.6	5233	21.5	–92	–321	–413

Table 2 (continued)

DISTRICT	STUDENT ENROLLMENT FACTORS				ENROLLMENT DECLINE		
	1977-78		1979-80				
	Total	Minority %	Total	Minority %	Minority	Other	Total
Westbury	3558	71.3	3238	73.7	–150	–170	–320
CSD #18	18666	55.6	17215	61.3	+169	–1620	–1451
CSD #21	23591	19.6	22078	20.9	–10	–1503	–1513
Mark Twain JHS	1093	19.9	881	17.5	–63	–149	–212
CSD #25	23097	15.5	21318	14.8	–430	–1349	–1779
Andrew Jackson SHS	2532	96.9	2501	98.7	+15	–46	–31
CSD #29	24674	70.0	22698	70.4	–1304	–672	–1976
Staten Island	56930	10.5	54399	11.3	+174	–2705	–2531
Niagara Falls	13364	21.2	11556	23.1	–170	–1638	–1808
Syracuse	24641	31.9	22547	32.4	–557	–1537	–2094

Table 2 (continued)

	STUDENT ENROLLMENT FACTORS				ENROLLMENT DECLINE		
	1977-78		1979-80				
DISTRICT	Total	Minority %	Total	Minority %	Minority	Other	Total
Newburgh	12154	27.3	11290	27.4	–223	–641	–864
Huntington	6598	9.5	5799	9.6	–68	–731	–799
Mount Vernon	10504	69.9	9858	71.8	–257	–389	–646
New Rochelle	9841	27.8	8994	29.0	–119	–728	–847
White Plains	7162	30.3	6464	32.0	–101	–597	–698
Yonkers	25518	18.5	22790	20.1	–135	–2593	–2728
Ossining	4874	21.0	4149	23.7	–37	–688	–725
TOTAL	404065		371375		–5573	-27117	–32690

Table 3

Scope of Department Integration/Desegregation Activities*

School District	Conflict Resolution	Desegregation Planning	Funding Assistance	Multicultural Curricula	LEA Staff Development	Resolving Reseg-Regation Problems	Assessing Needs	General Technical Assistance	School/Community Relations	Affirmative Action Assistance
Poughkeepsie		X	X			X	X	X		
Buffalo		X	X	X	X	X	X	X	X	X
Rochester		X	X		X	X	X			
Glen Cove	X									X
Uniondale									X	
Freeport			X		X	X	X		X	
Baldwin		X	X		X		X	X	X	X
Malverne	X					X				
Rockville Centre	X	X	X	X	X		X	X	X	

* These are in addition to the regular desegregation activities shown in Table 1.

Table 3 (continued)

School District	Conflict Resolution	Desegregation Planning	Funding Assistance	Multicultural Curricula	LEA Staff Development	Resolving Reseg-Regation Problems	Assessing Needs	General Technical Assistance	School/Community Relations	Affirmative Action Assistance
Long Beach	X		X		X				X	
Westbury					X	X				
CSD#18		X	X			X				
CSD #21			X					X		
Mark Twain Jr. H.S.			X			X	X	X		
CSD #25			X				X			
Andrew Jackson Sr. H.S.		X	X	X	X		X	X		
CSD #29			X	X				X		
Staten Island	X		X	X	X		X	X	X	X
Niagara Falls		X	X		X	X	X	X		
Syracuse		X	X	X	X		X	X		
Newburgh	X	X	X	X	X		X	X	X	X

Table 3 (continued)

	Conflict Resolution	Desegregation Planning	Funding Assistance	Multicultural Curricula	LEA Staff Development	Resolving Reseg-Regation Problems	Assessing Needs	General Technical Assistance	School/Community Relations	Affirmative Action Assistance
Huntington		X				X				
Mt. Vernon		X	X	X		X	X	X	X	X
New Rochelle		X	X		X	X	X	X	X	
White Plains		X	X			X		X		
Yonkers		X	X		X		X	X	X	
Ossining	X			X		X			X	

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The United States Constitution, Fourteenth Amendment, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

20 U.S.C. § 1703 provides in pertinent part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affir-

mative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

20 U.S.C. § 1706 provides in pertinent part:

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.

20 U.S.C. § 1720 provides in pertinent part:

For the purposes of this subchapter—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801(k) of the Elementary and Secondary Education Act of 1965.

(b) The term "local education agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965.

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 2000c(b) of Title 42.

(e) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency.

Supreme Court, U.S.
FILED
MAY 2 1997
OFFICE OF THE CLERK

No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNET;

(Caption Continued on Inside Front Cover)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

YONKERS BRANCH NAACP'S OPPOSITION TO STATE OF NEW YORK'S PETITION FOR WRIT OF CERTIORARI

DENNIS COURTLAND HAYES
Counsel of Record
General Counsel
NAACP Special
Contribution Fund
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

MICHAEL H. SUSSMAN
STEPHEN BERGSTEIN

SUSSMAN, BERGSTEIN
& WOTORSON
25 Main Street
Goshen, New York 10924
(914) 294-3991

Attorneys for Respondent Yonkers Branch NAACP

23 pp

ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO, as Director of the Urban Development Corporation,

Petitioners,

vs.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly-situated and the CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly interpreted the Equal Protection Clause and 42 U.S.C. section 1983 to hold petitioners liable for school segregation in the City of Yonkers where the district court held as a matter of fact that their failure to take remedial action, together with actions designed to cut back on school desegregation, were in response to pressures by State officials and constituents who opposed desegregation on grounds that were known to be race-based?

2. Whether the Court of Appeals improperly intruded on State authority by citing State law to hold that petitioners were required to ensure that school districts comply with the law and act to combat school segregation?

3. Whether the Court of Appeals violated principles of federalism and comity by imposing section 1983 liability against petitioners for maintaining school segregation in the City of Yonkers in response to local and state-wide opposition to desegregation?

RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, respondent NAACP states that it does not have a corporate parent, subsidiary, or affiliate.

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YONKERS BRANCH NAACP'S OPPOSITION TO STATE OF NEW YORK'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Respondents' statement of facts

The petition for a writ of certiorari significantly understates the district court and Second Circuit's findings respecting how and why petitioners failed to combat school segregation in Yonkers in violation of the Equal Protection Clause. These facts establish that the Second Circuit faithfully applied this Court's Equal Protection precedents by holding petitioners liable under 42 U.S.C. sec. 1983.

Following a six-week trial during which the district court received thousands of exhibits and heard testimony from more than 30 witnesses, it reached the following factual conclusions upon which the Court of Appeals relied to impose section 1983 liability against petitioners.

1. Petitioners knew or should have known that the segregation in Yonkers was *de jure* and that Yonkers would not take the steps necessary to end it. Pet.App. 9a-10a. The district court "found that the State defendants were aware of circumstances that should have alerted them to the likelihood that Yonkers had a substantial problem of unlawful segregation in its schools and that if the State defendants were not so alerted, it was because they themselves chose to remain ignorant in the face of actual conflicting evidence." Pet.App. 9a.

2. "[T]he State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force

compliance, it is not because it lacked the authority or practical power to do so." Pet.App. 11a (quoting district court opinion). Indeed, the State Education Department is among the most activist state educational bodies in the country as it "vigorously monitor[s] and regulat[es] many different aspects of education." Pet.App. 10a (quoting district court opinion).

3. "The State did not, in short, require anything of Yonkers in the area of school desegregation. While proclaiming a willingness to help Yonkers if Yonkers were to choose to desegregate voluntarily, the State decided that it would not force Yonkers to change." Pet.App. 12a (quoting district court opinion) (internal quotations omitted).

4. "In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation. . . .[T]he court found, *inter alia*, that the Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegregation." Pet.App. 12a-13a. Specifically, individual Regents urged the State Education Commissioner not to resolve citizen segregation petitions by entering drastic desegregation orders. The Regents sought to reign in the Commissioner, Ewald Nyquist, a desegregation proponent, and, in 1976, fired him substantially because of his views on integration. Petitioners also revised their policy statement on segregation to dilute its pro-segregation force. Pet.App. 13a. Following the judicial invalidation of a statute that prohibited State and local education officials from assigning students to achieve racial balance or taking other desegregative actions, *"the State took measures that had the cumulative effect of undermining efforts to reduce school segregation.*" Pet.App. 14a (emphasis in original) (quoting district court opinion).

5. Critically, "[t]he reasons for the State defendants' actions and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." Pet.App. 13a. "The district court found that the determined reluctance on the

part of the State to enforce its own desegregation policy in Yonkers resulted chiefly from the fact that race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation. These pressures can only be explained in racial terms." Pet.App. 14a-15a (quoting district court opinion). In summary, the Court of Appeals affirmed the district court's finding that

> the State had the power to act in support of school desegregation in Yonkers, but it lost the will to act. And it lost the will to act for the simple reason that its once touted principles of racial equality in the schools had become politically untenable. Pet.App. 15a (quoting district court opinion).

See also, Pet.App. 37a-38a ("[T]here was ample support, and the State defendants do not appear to contend otherwise, for the court's finding that the failure of the SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of heavy pressure from the New York State Legislature"); Pet.App. 41a ("The court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated").[1]

6. "The district court found that the State's acts and omissions impacted the City in several ways. The most obvious way was that Yonkers was not forced to desegregate its schools. There is every reason to believe that had the State

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[1] Petitioners erroneously state that the Court of Appeals concluded that their actions and omissions "were undertaken in response to legislative pressures they knew to be racially motivated." Pet. 8 (citing Court of Appeals opinion at Pet.App. 44a). In fact, the Court of Appeals made clear that petitioners had deferred "to the racially inspired positions of the local officials *and* the known anti-desegregation stance of other state officials." Pet.App. 44a (emphasis added).

brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions." Pet.App. 15a (quoting district court opinion). The State officials and the Board of Regents made no serious effort to dispel the public perception, of which they were aware, that the State would not force Yonkers to desegregate. Thus it occurred in Yonkers, where local support for desegregation was minimal and no citizen-initiated . . . proceeding was ever commenced, desegregation simply did not take place until it was compelled by order of the federal court." Pet.App. 17a (quoting district court opinion).

B. The Court of Appeals' opinion

In reversing the district court's holding that petitioners were not liable under the Equal Protection Clause for school segregation in Yonkers, the Court of Appeals largely adopted the district court's findings of fact. Pet.App. 9a-17a. However, the Court of Appeals applied its own, as well as this Court's, precedents to hold that petitioners had violated the Equal Protection Clause. Pet.App. 26a-44a. Specifically, the court applied *United States v. Yonkers Board of Education*, 624 F.Supp. 1276, *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied* 486 U.S. 1055 (1988) ("*Yonkers III*") which, in turn, cited *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Palmore v. Sidoti*, 466 U.S. 429 (1984) to hold, *inter alia*, that "the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet.App. 28a (citing *Yonkers III*, 837 F.2d at 1224).

The Second Circuit also held that the Equal Educational Opportunities Act ("EEOA") abrogates the State's Eleventh Amendment immunity (Pet.App. 46a) and respondents were entitled to prevail against petitioners under that statute. Id. at 45a. As section 1983 provides an independent basis for liability against petitioners even without the Second Circuit's

EEOA rulings, we do not address their arguments in support of certiorari respecting that statute.

REASONS FOR DENYING PETITION FOR CERTIORARI

This Court will only grant a petition for certiorari for compelling reasons, including a conflict with a decision of another circuit or to review an opinion that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of this Court's supervisor power." Supreme Court Rule 10.

Since the portion of the Second Circuit's opinion imposing section 1983 liability against petitioners (1) faithfully applies this Court's Equal Protection jurisprudence and neither departs from nor violates traditional causation principles and (2) petitioners do not identify any conflict with circuit precedent, there is no compelling reason to grant certiorari and this Court should decline to do so.

POINT I

THE COURT OF APPEALS FAITHFULLY APPLIED SUPREME COURT AUTHORITY AND PRINCIPLES GOVERNING INTENT AND CAUSATION TO HOLD THAT RACIALLY-MOTIVATED OPPOSITION TO SCHOOL SEGREGATION IN YONKERS COULD NOT LEGALLY INFORM PETITIONERS' FAILURE TO ENFORCE THEIR ANTI-SEGREGATION POLICIES

A. The district court properly interpreted the Equal Protection Clause to hold petitioners liable for their intentional failure to enforce anti-segregation policies because they capitulated to widespread opposition to desegregation

While acknowledging that the Second Circuit affirmed the district court's factual conclusion that their failure to properly remedy school segregation in Yonkers represented a

capitulation to racially-motivated hostility to segregation (pet. at 9), petitioners argue that this Court should grant the writ because the Circuit Court stood "reality on its head" by holding that they caused the constitutional violations. Pet. at 17. However, certiorari is unnecessary because the Second Circuit's decision is faithful to this Court's precedents governing Equal Protection, intent and causation.

As an initial matter, contrary to petitioners' assertions, the Second Circuit did not impose liability based solely on the basis of their failure to remedy school segregation in Yonkers; the court also concluded, "[I]n addition to refusing to act to end segregation in Yonkers, *the State took certain actions that had the effect of encouraging that segregation.*" Pet.App. 12a (emphasis added). *See also*, Pet.App. 13a ("The reasons for the State defendant's *actions* and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based"). (Emphasis supplied).

In any event, the Equal Protection Clause contemplates that State officials cannot refuse to enforce their desegregation policies because of racially-motivated community and State opposition. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court held that the effects of racial prejudice cannot justify a classification designed to remove an infant from the custody of its natural mother. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" *Id.* at 433 (*citing Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)). While the Second Circuit cited *Palmore* as a basis to find liability throughout this litigation, including *Yonkers III*, petitioners fail to distinguish or even address it. Pet.App. 28a-29a.

Palmore is not the only Supreme Court precedent that the Second Circuit relied upon in concluding that racially-motivated inaction may predicate section 1983 liability. In *Buchanan v. Warley*, 245 U.S. 60 (1917), this Court invalidated a law motivated by an express desire to promote the public peace by preventing race riots, which forbade African-Americans from buying homes in white neighborhoods. *Palmore*, 466 U.S. at 433. *See also*, *id.* at 434, fn.3 (*citing*, *Watson v. Memphis*, 373 U.S. 526 (1963) (city officials could not proceed slowly to desegregate parks in order to "prevent interracial disturbances, violence, riots, and community confusion and turmoil") and *Wright v. Georgia*, 373 U.S. 284 (1963) ("the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present").

In addition, *Yonkers III*, on which the Court of Appeals relies,[2] cited *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *Yonkers III*, 837 F.2d at 1224. In *Lucas*, this Court invalidated a discriminatory legislative reapportionment plan that the electorate had approved. This Court reasoned, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." 377 U.S. at 736-37. *Cleburne* employed similar reasoning to strike down a city requirement that a permit be obtained for the use of a dwelling as a home for mentally retarded persons where no such permit was required for similar types of uses for other dwellings. "The city may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." 473 U.S. at 448 (citing *Palmore*, *supra*). As *Yonkers III* noted,

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[2] *Yonkers III* articulated the principle that petitioners wish this Court to review. In *Yonkers III*, the Second Circuit held, *inter alia*, that municipal officials illegally capitulated to their constituents' racial animus when making subsidized housing decisions that adversely affected minorities. 837 F.2d at 1222-26.

"The circuit courts have applied these principles in the context of challenges to segregation in both schools and housing, ruling that discriminatory action is not lawful simply because it was taken in response to the racially motivated opposition of a segment of the community." 837 F.2d at 1224-25.

Petitioners cannot articulate a constitutionally-meaningful distinction between affirmative State action intended to create and perpetuate segregation and a conscious failure, motivated by constituent and governmental opposition to desegregation, to pursue the steps necessary to end it. Inaction has the same effect as illegal action where State actors can and do reasonably foresee that their failure to proceed will cause segregated conditions. Recognizing that principle, *Columbus Board of Education*, *supra*, 443 U.S. at 464-65, a school desegregation case, stated:

> actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. These cases do not forbid the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be drawn. *Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in considering whether an inference of segregative intent should be drawn.* (Emphasis added).

Moreover, concluding that "[l]iability may be premised not only on action but on a refusal to act," the Second Circuit cited *Doe v. New York City Department of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981), which, in turn, invoked *Estelle v. Gamble*, 429 U.S. 285 (1976). Pet.App. 30a-31a. In *Estelle*, an Eighth Amendment case, this Court stated, "in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

Accordingly, contrary to petitioners' assertions, this case is not about the imposition of section 1983 liability because the Second Circuit applied a "hindsight view that the state officials not only could, but should, have done more in Yonkers." Pet. at 14. Also, the Second Circuit did not apply an "if not part of the solution, then part of the problem" causation theory. *Id. See also*, Pet. at 19 ("The Second Circuit's imposition of liability, in the absence of the heretofore requisite element of intent, is cause for this Court's review"). This critique ignores an important factual conclusion supported by the evidence and affirmed by the Second Circuit: petitioners capitulated to community and statewide opposition to desegregation by intentionally failing to use their uncontroverted authority to eradicate school segregation in Yonkers.

Petitioners cannot now challenge as factually erroneous the district court's conclusion that they failed to end segregation in Yonkers in response to racially-motivated pressures by government officials and the community (the same theory of liability predicating the district court's 1985 liability ruling which the Second Circuit affirmed in *Yonkers III*). Indeed, the Second Circuit liberally cites the district court's factual conclusions. *See*, *e.g.*, Pet.App. 13a ("The reasons for the State defendants' actions and inactions, the district court found, were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based"); *id.* at 14a-15a ("The district court found that the determined reluctance on the part of the State to enforce its own desegregation policy in Yonkers resulted chiefly from the fact that race-based political opposition to integration throughout New York State eventually exerted enough pressure on the Regents and on SED officials as to cause them to become cautious and reactive on the issue of desegregation. *These pressures can only be explained in racial terms*") (citations omitted) (emphasis supplied).

As the Second Circuit concluded, petitioners would have employed its powerful remedial resources to enforce its anti-segregation policies but for its purposeful desire not to buck

the anti-desegregation mentality that it knew had surfaced locally and statewide. The Circuit held, "[t]here is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions." Pet.App. 15a (quoting district court opinion). *See also*, Pet.App. 12a ("While proclaiming a willingness to help Yonkers if Yonkers were to choose to desegregate voluntarily, *the State decided that 'it would not force Yonkers to change'*" (citing district court) (emphasis supplied). In short, consistent with this Court's Equal Protection Clause jurisprudence, the Second Circuit properly found petitioners liable because segregation in Yonkers was "*maintained* by intentional state action," that is, petitioners' racially-motivated refusal to wield its broad authority to end school segregation in Yonkers. *Columbus Board of Education*, 443 U.S. at 464 (citations omitted) (emphasis supplied).

B. Petitioners ignore the Second Circuit's conclusion that they took actions that had the effect of impeding desegregation efforts in Yonkers

The gravamen of the certiorari petition is that the Second Circuit improperly imposed section 1983 liability against petitioners by concluding that the intentional refusal to enforce anti-discrimination policies may violate the Equal Protection Clause. *See, e.g.*, Pet. at 19. However, petitioners completely ignore the Second Circuit's conclusion that they are liable for maintaining school segregation in Yonkers by committing acts that effectively preserved the *status quo*. *See*, Pet.App. 12a ("In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation").

Specifically, the Second Circuit noted that, while petitioners did not affirmatively act to impede desegregation efforts in Yonkers or indicate that they approved of it or would "look the other way" should Yonkers maintain its segregative practices, "the Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school

desegregation." Pet.App. 12a-13a. When desegregation petitions were pending before New York's pro-desegregation Education Commissioner, Ewald Nyquist, the Regents urged him not to enter strong desegregation orders. *Id.* at 13a. Also, the Regents "sought to reign in Nyquist's desegregation efforts" and "revised their policy statement on segregation so as to dilute[ ] [its] pro-desegregation force." *Id.* (quoting district court opinion) (modifications in original). In November 1976, the Regents fired Nyquist, substantially because of his views on integration. Pet.App. 13a, 14a. Like their refusal to enforce the State's anti-segregation policy, the Court of Appeals concluded that petitioners took actions that effectively encouraged segregation in "respon[se] to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." Ja13a. *See also,* Pet.App. 14a-15a.

Petitioners' actions that effectively encouraged segregation in Yonkers were far from the passive decisions and inaction that they claim informed the imposition of section 1983 liability. Like their intentional failure to enforce the State's anti-segregation policies, these actions had the foreseeable effect of encouraging and maintaining segregation in violation of the Equal Protection Clause. Not only is the foreseeable effect of an intentional act sufficient to impose liability under traditional tort principles, *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), this Court has stated that it may establish discriminatory intent in the school segregation context. *See, Columbus Board of Education, supra,* 443 U.S. at 464-65 ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. . . . *Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in considering whether an inference of segregative intent should be drawn")* (emphasis added).

Since the Second Circuit properly applied traditional tort principles and *Columbus Board of Education* to impose

liability on petitioners for taking actions that effectively maintained school segregation in Yonkers, certiorari is improper.

POINT II

NEW YORK EDUCATION OFFICIALS ARE REQUIRED TO ENSURE THAT SCHOOL DISTRICTS COMPLY WITH THE LAW AND ACT TO COMBAT SCHOOL SEGREGATION

Petitioners argue that the Second Circuit improperly imposed section 1983 liability against them despite their inability to micro-manage school districts. Pet. at 15-16. However, as the Second Circuit properly concluded that petitioners are required to ensure that school districts comply with State policy and Federal law, certiorari is improper.

As the Second Circuit noted, New York Education Law contains numerous provisions requiring petitioners to exercise meaningful oversight over every school district and, *inter alia*, "enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents." Education Law sec. 305 (1) (McKinney's 1988). Petitioners acknowledge that "the State's role is to regulate, monitor and advise" the districts. Pet. at 15-16. They "are charged with the general management and supervision of all public schools" (Education Law sec. 101) and the Education Commissioner "shall also have the power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any party thereof or to any school district." Education Law sec. 308. *See generally*, Pet.App. 42-43a (Court of Appeals reviewed applicable New York statutes governing education and petitioners' powers and broad duties to intervene where "racial imbalance in the schools of a given community has made the schools educationally inadequate") (*citing Vetere v. Allen*, 15 N.Y.2d 259, 267, 206 N.E. 174, *cert. denied* 382 U.S. 825 (1965)).

As *de jure* school segregation is precisely the kind of educational problem that required petitioners to actively enforce their anti-segregation policies, their argument that the Second Circuit improperly expanded their responsibilities under the Education Law merits no basis for certiorari.

POINT III

THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY ON PETITIONERS DID NOT VIOLATE PRINCIPLES OF FEDERALISM OR COMITY

While petitioners pray for certiorari because the Second Circuit violated principles of federalism and comity by imposing section 1983 liability against them, their analysis conspicuously ignores a critical fact: they capitulated to racially-motivated opposition to desegregation by maintaining school segregation in Yonkers. *Compare*, Pet. at 20 (the Second Circuit opinion "has the untenable result of subjecting state officials to constitutional liability whenever, in the view of the federal courts, they fail to act quickly or thoroughly enough in response to unlawful municipal actions of which that States are held to have knowledge and the authority to correct") *with* Second Circuit opinion at Pet.App. 41a ("The [district] court permissibly found that the State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated") (*citing Yonkers III*, 837 F.2d at 1224-26, 1232).

While State governments have latitude to manage their internal affairs, they are not exempt from requirements imposed by the Equal Protection Clause and section 1983. On the basis of the district court's factual findings which the Second Circuit adopted to impose section 1983 liability against petitioners, the issue is not whether that court could intervene in matters about which reasonable people could disagree. As there is nothing reasonable about intentional school segregation or petitioners' intentional acts and omissions which maintained an illegal *status quo*, granting certiorari on the

ground that the Second Circuit has intruded on legitimate State prerogatives would be improvident.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 29, 1997
Goshen, New York

Respectfully submitted,

MICHAEL H. SUSSMAN
STEPHEN BERGSTEIN

SUSSMAN, BERGSTEIN
& WOTORSON
25 Main Street
Goshen, New York 10924
(914) 294-3991

Attorneys for Respondent,
Yonkers Branch, National Association
for the Advancement of Colored People

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK, ET AL.

Petitioners,

v.

YONKERS BOARD OF EDUCATION, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

DAVID G. LEITCH*
STEVEN J. ROUTH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5822

* Counsel of Record

Counsel for Respondent Yonkers Board of Education

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the State of New York and officials of that State were liable under the Equal Protection Clause and the Equal Educational Opportunities Act for school segregation in the City of Yonkers where the District Court found—and it is undisputed in this Court—that the State and its officers "knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated" and that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials."

2. Whether the Second Circuit correctly held, as every other federal court to consider the issue has done, that the Equal Educational Opportunities Act abrogates a State's Eleventh Amendment immunity from suit in federal court.

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IN THE

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No. 96-1628

THE STATE OF NEW YORK, ET AL.,

Petitioners,

v.

YONKERS BOARD OF EDUCATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

Respondent the Yonkers Board of Education respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

The petition for writ of certiorari is the latest effort of the State of New York and various state-related entities and officials to avoid their responsibility for assisting in the completion of the desegregation remedy in the Yonkers public schools. The petition arises, however, in the context of critical factual findings either wholly unchallenged on appeal or affirmed by the court of appeals on the basis of "ample support" in the evidence.

Those factual findings—many of which the petitioners essentially ignore—demonstrate the petitioners' responsibility for the continuing effects of the former dual school system in Yonkers and establish the correctness of the Second Circuit's decision.

More importantly for purposes of considering the petition, nothing in petitioners' submission even comes close to establishing that this case warrants plenary review by this Court. Far from creating a conflict with decisions in other circuits, the decision of the Second Circuit applied settled law articulated by this Court and by other circuits to the largely undisputed facts of this case. Essentially admitting as much, petitioners are left at one point to suggest that the unanimity in the circuits against their position should compel this Court to act. *See* Pet. 24. This contention, of course, serves only to highlight that none of the traditional factors motivating this Court to exercise its discretionary review are present here. The petition should be denied.

COUNTERSTATEMENT

This school desegregation case was initiated in 1980 by the United States (later joined by the NAACP) against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. In 1985, the district court found, *inter alia*, that the City and the Yonkers Board had unlawfully segregated the public schools in Yonkers, in violation of the Fourteenth Amendment. 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

In affirming that decision, the Second Circuit recognized that "race-based decisions" had contributed to school segregation and inequalities in Yonkers in a number of areas, including: (i) the special education program; (ii) the vocational education program; (iii) the quality of school facilities and programs generally; and (iv) school staffing. 837 F.2d at 1195-1208, 1226-33.

The Second Circuit also affirmed the district court's finding that, in Yonkers, there was an "interrelationship" between the unlawful segregation of schools and unlawful segregation of subsidized housing as a result of site selection decisions that concentrated subsidized housing in Southwest Yonkers, where schools had disproportionately minority enrollments, and maintained the "all-white" character of other areas and schools in the City. *Id.* at 1185-94, 1208-09, 1214-15.

In 1986, the district court approved a school desegregation remedy, 635 F. Supp. 1538, which effectively ended the segregation of students among school facilities in Yonkers. The district judge specifically has found that, "[a]s a result of the good faith and zealous implementation by the Yonkers Board of Education and its staff of this Court's initial School Remedy Order of May 13, 1986 (Educational Improvement Plan ("EIP") I)," the Yonkers Board "achieved desegregation of enrollments among the schools" in "less than a year of the issuance of EIP I." 833 F. Supp. 214, 216 (1993).

The plaintiffs, however, soon concluded that EIP I, while effective in ending overt segregation among schools, was not and would not be effective in eliminating to the extent practicable inequalities in the educational program, in-school segregation, and other vestiges of the unlawful dual school system, or in supporting effective desegregation of schools in Yonkers pending implementation of the housing remedy. The plaintiffs filed motions to add the State defendants as parties to the case, and the Yonkers Board sought leave to file a cross-claim.[1] The proposed pleadings alleged that the State

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[1] The State defendants included the State itself, the State Education Department ("SED"), the State Urban Development Corporation ("UDC"), and the Board of Regents, which are collectively referred to as "the State institutional defendants." Also included were the individual Regents of the Board of Regents, the Commissioner of Education, and the Director of the UDC (collectively "the State officials").

had contributed to unlawful segregation in Yonkers and therefore could be held liable and required to participate in the additional remedial measures needed to complete the process of making the Yonkers public schools a unitary system.

After substantial delays caused in large measure by the State,[2] the district court granted the motions to add the State defendants and conducted a three-week trial addressed to the issue whether there continue to exist

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[2] On November 5, 1987, at the insistence of the State, the district court decided to hold the plaintiffs' motions in abeyance while the Yonkers Board developed a written plan of additional remedial measures and sought consensual resolution on funding for those measures. The Yonkers Board developed a detailed remedial plan that proposed specific measures tailored to address the practices and conditions that had been identified as vestiges of unlawful segregation. On January 19, 1989, after plaintiffs had spent more than a year unsuccessfully attempting to obtain State assistance with that plan, the district court granted plaintiffs' motions and added the State defendants as parties.

Further delay attributable to the State also resulted when the State—on three separate occasions—sought interlocutory review of decisions by the district court. In each case the Second Circuit dismissed the appeals. *See United States* v. *Yonkers Bd. of Educ.*, 893 F.2d 498 (2d Cir. 1990); *United States* v. *Yonkers Bd. of Educ.*, 990 F.2d 623 (2d Cir. 1993) (table); *United States* v. *Yonkers Bd. of Educ.*, No. 94-6052 (2d Cir. Mar. 2, 1994) (unpublished order of dismissal).

The State's foot-dragging also affected the district court's fact-finding process. In response to a request from the district court, the State initially agreed to identify any findings in the 1985 decision by which it refused to be bound. The State later requested, and the district court directed, that the Yonkers Board prepare specific Requests for Admission (RFAs) under Fed. R. Civ. P. 36, to determine whether the State disputed any of those findings. The State agreed to respond to such RFAs in a "reasonable" manner. When the State later refused to respond to those RFAs within the extended time set by the court, the district court directed that all of the RFAs be deemed admitted, subject to the State's right to withdraw any admission upon a proffer of grounds for reopening a finding from the 1985 decision. The State never sought to withdraw any admissions.

"vestiges of segregation in the Yonkers school system" not "adequately addressed" by EIP I. The district court defined "[a] vestige of segregation" as "a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects," 833 F. Supp. at 218-219, consistent with this Court's holdings in *United States* v. *Fordice*, 505 U.S. 717 (1992), and *Freeman* v. *Pitts*, 503 U.S. 467 (1992). Using this definition, the district court found that "vestiges of segregation remain in the Yonkers Public School system" and that the EIP I desegregation remedy was "inadequate to eradicate vestiges of segregation 'root and branch' and must be expanded." 833 F. Supp. at 225. The district judge specifically stated: "We find that although minority students in Yonkers attend school in the same buildings as majority students, they are undergoing different educational experiences." *Id.* That decision was not at issue in the Second Circuit (*see* Pet. App. 7a) and is not presented here. Thus, for purposes of the petition, it is a given that the vestiges of the racially dual school system continue to exist in Yonkers.

In 1994, the district court conducted a six-week trial on whether the State was liable for unlawful school segregation and its vestiges in Yonkers as of the time of the district court's 1985 decision. In support of their case, plaintiffs presented testimony from over thirty witnesses as well as over 2,000 exhibits. The district court received testimony from members and former members of the Board of Regents, a former State Commissioner of Education and a former Deputy Commissioner, key officials from the SED, the former head of the UDC, and UDC officials who were responsible for its subsidized housing in Yonkers. The court also received testimony from Yonkers officials and community leaders who interacted with the State on school and housing issues.

The district court made extensive factual findings, which were either unchallenged or affirmed on appeal. These included findings that:

- " '[T]he State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*.' " Pet. App. 9a-10a (quoting *id.* at 67a).
- The State " 'possessed the full means and authority to deal with Yonkers school segregation, had it been inclined to do so.' " *Id.* at 10a (quoting *id.* at 116a). *See also id.* at 73a ("the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so").
- Rather than using that authority, "the State defendants did nothing to remedy school segregation in Yonkers, using none of their power and authority toward that end." *Id.* at 11a. "Rather than act, the State waited." *Id.* at 73a.
- To the extent it did act, moreover, "the State took certain actions that had the effect of *encouraging* that segregation." *Id.* at 12a (emphasis added).
- "[T]he *reasons* for the State defendants' actions and inactions * * * were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." *Id.* at 13a (emphasis added). *See also id.* at 76a (State's "determined reluctance" to address racial segregation in Yonkers was because "race-based political opposition to integration throughout New York State eventually exerted enough pressure on [State education] officials to cause them to become cautious and reactive on the issue of desegregation"). The pressures to which State

officials responded, the lower courts found, "can only be explained in racial terms." *Id.* at 15a, 116a.

- The State's "race-based" conduct had the effect of perpetuating unlawful segregation in Yonkers in both "obvious" and "more subtle, but equally real" ways. *Id.* at 80a. "The most obvious way was that 'Yonkers was not forced to desegregate its schools.' " *Id.* at 15a (quoting *id.* at 80a).
- Like the State itself, the New York State Urban Development Corporation ("UDC")—"perhaps the most powerful state housing and development agency ever created," *id.* at 82a—"had the power to take steps to alleviate" the unlawful segregation in Yonkers but "failed to do so, and instead worsened segregation by knowingly bowing to political pressure it knew to be race-based." *Id.* at 17a.

Despite these findings, the district court concluded "with reluctance," *id.* at 116a, that there was insufficient evidence to find the State officials liable under 42 U.S.C. § 1983. For this conclusion, it relied solely on its resolution of the "close and difficult question," Pet. App. 98a, of interpretation of the Second Circuit's decision in *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *See* Pet. App. 93a-99a; 112a-115a. It also found that the claims against UDC and its officials were time-barred. *Id.* at 110a-112a. In a separate opinion, the district court declined to hold the State institutional defendants liable pursuant to the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1701 *et seq.*, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See* Pet. App. 118a-137a.

On respondents' appeal, the State challenged "only the finding that the State defendants knew or reasonably should have known that the segregation in Yonkers was *de jure* rather than *de facto*." Pet. App. 34a. After

reviewing the evidence, the Second Circuit held that it "amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*." *Id.* at 37a. The Second Circuit also found based on a review of the evidence that the district court's other factual findings—essentially not challenged by the State defendants—were "amply supported." *Id.* at 40a.

On the strength of the district court's factual findings, the Second Circuit unanimously reversed the district court's admittedly "reluctan[t]" conclusion, *id.* at 116a, that the State defendants could not be held liable. After reviewing "fundamental principles governing equal protection claims," *id.* at 26a; *see id.* at 26a-31a, the court found that "[t]hese principles govern the present case," because the district court "found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *Id.* at 31a-32a. The Second Circuit also stated that the record left "no doubt" that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *Id.* at 44a.

The "amply supported factual findings," the Second Circuit held, "distinguish the present case from *Arthur* v. *Nyquist,*" the Second Circuit case on which the district court had based its decision. *Id.* at 40a. In that case, there was evidence that the state officials "made substantial, repeated efforts" to require local officials in

Buffalo to develop and implement a desegregation plan and that "the state officials' decision not to use more drastic measures was the result of legitimate considerations rather than of their capitulation to views they knew to be racially motivated." *Id.* at 41a. The court found the evidence "materially different" with respect to Yonkers, *id.*, and held that the State officials were liable under 42 U.S.C. § 1983.

The Second Circuit further held that the EEOA abrogated the Eleventh Amendment immunity of the State institutional defendants, expressly endorsing the conclusion of the Seventh Circuit in *Gomez* v. *Illinois State Board of Education*, 811 F.2d 1030, 1038 (7th Cir. 1987). Pet. App. 46a. *See also Los Angeles Branch NAACP* v. *Los Angeles Unified Sch. Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). On the merits of the EEOA claims, the court found the district court's rejection of the claims infected with its misunderstanding of the Second Circuit's *Arthur* decision, and, therefore held that "[p]laintiffs' claims against the State, SED, and the Board of Regents under the EEOA should have been upheld." Pet. App. 50a. For this conclusion, it relied on the Sixth Circuit's decision in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978).[3]

Finally, the court of appeals found that the district court's rejection of plaintiffs' claims with respect to the State's segregative housing conduct and its continuing effects on Yonkers schools also was affected by the district court's misapplication of *Arthur*, and ordered the court to reconsider its dismissal of those claims on remand. Pet. App. 51a-54a.

The Second Circuit therefore remanded the matter to the district court for proceedings not inconsistent with its

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[3] The court's conclusions with respect to section 1983 and the EEOA made it unnecessary for the court also to consider liability under Title VI. *See* Pet. App. 51a.

opinion. Those still-pending proceedings will include determination of whether the housing-related claims go forward and determination of appropriate remedies as to all claims against the State defendants.

REASONS FOR DENYING THE WRIT

In this case, the District Court found that the State and its officers "knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." Pet. App. 31a-32a. The District Court also found that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *Id.* at 44a. On the strength of these findings—for which the Second Circuit found "ample support" in the record, *id.* at 37a, and which the State barely challenged in court below, *see id.* at 34a, and does not challenge at all in this Court—the Second Circuit held that the State and its officers were liable under the EEOA and section 1983, respectively, for the vestiges of segregation in the Yonkers school system. This holding does not warrant review by this Court as it is fact-bound, turns largely upon an interpretation of state law, conflicts with no decision of any other court of appeals, and, in addition, is legally correct.

I. THE HOLDING OF THE COURT BELOW—THAT THE STATE OFFICIALS WERE LIABLE UNDER 42 U.S.C. § 1983 FOR CAPITULATING TO RACIAL PRESSURES IN DEROGATION OF THEIR DUTY TO ENSURE DESEGREGATION IN YONKERS—DOES NOT WARRANT REVIEW

1. The State argues that the State officials cannot be liable under section 1983 because they were not the cause of the segregation in Yonkers. *See* Pet. 11-17. Before this Court, the State contends that its officials had no "responsibility" to remedy segregation in Yonkers and whatever remedial power they did have was merely "discretionary." *Id.* at 14, 11. On this view of the case, the State posits a conflict between the decision below and *Reid* v. *Kayye*, 885 F.2d 129 (4th Cir. 1989), and "[a] case very similar to" it (*id.* at 132)—*Bush* v. *Viterna*, 795 F.2d 1203 (5th Cir. 1986). *See* Pet. 16.

The conflict between *Reid* and *Bush* and the decision below is wholly illusory. In those cases, unlike this one, the state officers lacked any responsibility under state law to redress the constitutional violations at issue. Here, by contrast, the State officials had a duty arising under New York law to prevent and correct—rather than knowingly tolerate and encourage—the *de jure* segregation in Yonkers. Not only is there no conflict between *Reid* and *Bush* and the decision of the Second Circuit to hold the State officials liable, but a contrary holding by the court below might well have conflicted with *Penick* v. *Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), another school desegregation case in which state officials were held liable.

The plaintiffs in both *Reid* and *Bush* attempted to hold state officials liable under section 1983 for allegedly unconstitutional conditions at county jails. In each case, the attempt was rejected on the ground that, while the state officials may have had *authority* under state law to make recommendations or take some corrective action

with respect to the conditions of which plaintiffs complained, they had no state law-imposed *duty* or *responsibility* to do so. *See Reid*, 885 F.2d at 131 ("Because, in the case at bar, appellees had no duty to remedy the challenged jail conditions, their inactions cannot be seen as a cause of those conditions and a § 1983 suit cannot be maintained against them. * * * The *Bush* court examined Texas law and held that a § 1983 suit could not be maintained because the [state defendant] had no legal duty to enforce applicable jail standards."). Both courts recognized, however, that a state official can be held to have "caused" for section 1983 purposes a violation of federal right on a supervisory liability theory. *See id.* at 131-132;[4] *Bush*, 795 F.2d at 1206, 1208.

Apart from the fact that this case arises in a markedly different context than either *Reid* or *Bush*, there is no conflict between the decision below and those decisions because here the Second Circuit determined that the State officials *did* have both power *and* responsibility to take action in response to the unconstitutional acts and conditions that they knew were occurring in Yonkers. The State argued in the court below that "the judgment in their favor should be upheld on the basis that, under New York law, they lacked legal authority or responsibility to intervene in Yonkers to remedy the unlawful segregation." Pet. App. 42a. The Second Circuit, however, concluded that "this contention need not detain us long" in light of "express provisions of New York statutory law" which specifically direct that state officials "shall enforce" all laws relating to education and are charged with the "duty" to take necessary steps to

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[4] "It is true that, while the doctrine of *respondeat superior* cannot be invoked in § 1983 cases, supervisory officials may be held liable in certain circumstances for constitutional injuries inflicted by their subordinates. Liability in those circumstances is not premised on *respondeat superior* but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in constitutional injuries." *Reid*, 885 F.2d at 131-132 (citation omitted).

that end. *Id.* at 43a. Pointing to various provisions of the New York Education law (and also to several New York state cases), *see id.* at 42a-43a, the Second Circuit stated: "Given the statute's clear impositions of duty and grants of power, the State defendants' twin disclaimers of responsibility and authority are meritless." *Id.* at 44a.[5]

Clearly, the Second Circuit's understanding of the responsibilities imposed on the State officials under New York law is an issue of state law that does not merit this Court's attention. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"); *see also County Ct. of Ulster County* v. *Allen*, 442 U.S. 140, 153-154 (1979) (the Second Circuit's "experience with New York practice is entitled to respect"). The State argues that the Second Circuit interpreted New York law incorrectly, *see* Pet. 14-16, but this Court, quite properly, "usually is reluctant to grant review of cases turning on state statutes or constitutions." Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.10, at 183 (7th

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[5] The record below also contains extensive evidence—in the form of admissions both by state officials and in state policy statements and reports—that the State consistently has conceded that it has a duty to prevent and remedy unlawful school segregation. *See, e.g.*, Trial Exhibit 3-7 (1968 Policy Statement of State Board of Regents: "Where a district fails or refuses to act [to prevent or remedy school segregation], then the responsibility for corrective action is clearly and inescapably that of the State"). The record further contains extensive evidence as well as district court findings confirming that, with respect to issues other than school segregation and desegregation, the State not only has acknowledged but also has vigorously discharged its duty to supervise the schools and to take corrective action as necessary to ensure full compliance by Yonkers officials with federal and state law and policy. *See, e.g.*, Pet. App. 72a (finding that New York State Education Department "is one of the most activist state educational bodies in the country").

ed. 1993). Whether the Second Circuit was right or wrong about the requirements of New York law, its decision is easily reconcilable with *Reid* and *Bush*.

Furthermore, even if the State had no duty under New York law to prevent the establishment and maintenance of an unlawful dual school system in Yonkers, but only had—as the State concedes—discretionary authority to do so, its failure to exercise that authority *because of* illegitimate racial reasons is sufficient to impose liability. *See DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (although Due Process Clause does not require a State to provide protective services, failure to do so for discriminatory reasons violates Equal Protection Clause) (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)); *see also DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) (under *DeShaney* footnote 3, state "inaction" violates equal protection if it is "the product of invidious discrimination"). In neither *Reid* nor *Bush* was there an allegation that state officials failed to act for racially invidious reasons. *Compare* Pet. App. 31a-32a (the State officials "had the power to take steps to remedy [the segregation in Yonkers], and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated").

As the State acknowledges, *see* Pet. 16, this case is like *Penick*, in which state education officials, including the state board of education, were found liable for segregation in Ohio. Much like the New York state defendants in this case, the Ohio state board was found liable for "adopt[ing] a 'hands-off, let someone else do it' approach" to school desegregation. 663 F.2d at 27. As the Sixth Circuit further explained:

> [T]he Board operated with a few narrow exceptions according to a 'hands-off' policy in the area of school desegregation. Rather than using its supervisory powers to inquire into the possibility of law violations and its pursestrings to enforce compliance

> with the law, the Board developed policies and practices which effectively disabled it from acting at all in this area, thereby avoiding its obligation in the first instance to ferret out constitutional violations with the foreseeable result of maintaining and condoning constitutional violations by local boards.
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> The Court concludes that although there were available procedures for the discovery of unlawful segregation in Ohio, and the Board had the authority to remedy it, there was great reluctance to self-initiate any inquiry, and even more reluctance to exercise its power by withholding funding or using other available means as sanctions for a local district's maintenance of unconstitutional racial segregation. [*Id.* at 26].

Like the court below, the Sixth Circuit in *Penick* saw no conflict between its decision and the Second Circuit's decision in *Arthur*. *See id.* at 30. Thus, far from creating an intercircuit conflict, the court below likely *avoided* conflict by distinguishing *Arthur* and following *Penick*. The State does not argue that the court below erred in distinguishing *Arthur* and, in any event, any intracircuit conflict between the decision below and *Arthur* is a matter for the Second Circuit to resolve in the first instance. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). No judge on the Second Circuit requested that a vote be taken on whether to rehear the case *in banc*. Pet. App. 139a.

The fact that *Arthur* remains the law in the Second Circuit also belies the State's claim that the decision of the court below represents "an expansion of civil rights liability beyond what this Court has established." Pet. 11. *Arthur* rejected the notion that the State court be held liable on a respondeat superior theory, *see* 573 F.2d at 146 ("[W]e do not believe that the appellee's theory of derivative or indirect liability can be sustained") (citing

Rizzo v. *Goode*, 423 U.S. 362 (1976)), and also refused to impose liability simply because "it would have been possible for the state appellants to have intervened more forcefully in [the Buffalo desegregation] matter." 573 F.2d at 146. That remains the law in the Second Circuit after the decision below.

2. In light of the Second Circuit's determination that, under New York law, the State defendants had the legal "responsibility to intervene in Yonkers to remedy the unlawful segregation," Pet. App. 42a, there is no merit to the State's argument that the "failure of the state officials to play a sufficient remedial role," Pet. 17, could not be the "cause" of the constitutional violation for section 1983 purposes. It is well established in this Court's cases that section 1983 liability may be imposed on those who have a duty to act but fail to do so, *see, e.g.*, *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989) (inadequate police training gives rise to section 1983 liability for municipality where the "failure to train amounts to deliberate indifference"), and on those who are responsible for the constitutional violations of others under their charge, *see, e.g.*, *Board of the County Comm'rs of Bryan County* v. *Brown*, 117 S. Ct. 1382, 1389 (1997) (recognizing that a municipality is liable under section 1983 even absent "an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights" if it is the "moving force" behind the deprivation).

Furthermore, the record in this case establishes that the State officials not only failed to act to remedy the segregation in Yonkers but took actions that helped perpetuate the unlawful segregation. *See* Pet. App. 12a ("In addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation"); *id.* at 12a-13a ("[T]he Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegregation"); *id.* at 13a (referring to "the State defendants'

actions and inactions"); *id* at 15a ("The district court found that the State's acts and omissions 'impacted the City in several ways' "); *id.* at 41a ("[T]he State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated"); *id.* at 44a ("[T]he State defendants * * * took actions that encouraged the perpetuation of segregation").

3. The State also argues that its officials lacked the requisite discriminatory intent to commit a violation of the Equal Protection Clause. *See* Pet. 17-19. The State contends that the Second Circuit made an improper "legal leap" in finding such an intent in the State's failure to act. *Id.* at 19. The State identifies no court of appeals decision in conflict with the court below on this point and its argument is without merit.

The Second Circuit specifically recognized in this case that, to establish an equal protection violation, a plaintiff must "show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate." Pet. App. 26a (citing *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973)). The Second Circuit determined that the findings made by the District Court established such an intent on the part of the State defendants as "the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power *because they were capitulating to political pressures that they knew were racially motivated*." Pet. App. 31a-32a (second emphasis added). Indeed, as the Second Circuit recognized, the principles relied upon to find discriminatory intent and an equal protection violation by the State were precisely the same principles relied on by that court in affirming the liability of the

Yonkers Board of Education in 1987. *See id.* at 28a-31a.

Finding discriminatory intent in such circumstances falls squarely within this Court's previous articulation of equal protection principles: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) (quoting *Palmer* v. *Thompson*, 403 U.S. 217, 260-261 (1971) (White, J., dissenting). *Accord City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

Finally, in light of the above, the "fundamental principles of federalism," Pet. 19, that the State invokes cannot excuse it from liability for violating the Equal Protection Clause since the Fourteenth Amendment acts as an express limitation upon state sovereignty.[6]

II. THE HOLDING OF THE COURT BELOW THAT THE STATE INSTITUTIONAL DEFENDANTS WERE LIABLE UNDER THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS AND DOES NOT WARRANT REVIEW.

The Second Circuit held that, based upon the same factual findings supporting the liability of the State officials under section 1983, the State institutional defendants were liable under the EEOA. *See* Pet. App.

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[6] In the court below, respondents argued that the State officials were liable under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. *See* Respondents' C.A. Br. 48-57. Title VI therefore provides an additional legal basis on which the judgment against the State officials can be defended.

45a-50a.[7] The State contends that the Second Circuit erred in holding (1) that in the EEOA Congress abrogated the States' Eleventh Amendment immunity from suit in federal court, *see* Pet. 21-24, and (2) that the State institutional defendants were liable under the EEOA. *See id.* at 24-28. Neither contention merits review.

1. As the State points out, the Seventh and Ninth Circuits agree with the Second Circuit's conclusion that the EEOA abrogates a State's Eleventh Amendment immunity. *See* Pet. 24 (citing *Gomez*, 811 F.2d at 1037 ("Congress abrogated the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the [EEOA]"), and *Los Angeles Branch NAACP*, 714 F.2d at 950 ("Congress abrogated California's immunity from suit in desegregation cases by enacting [the EEOA]").[8] With admirable (but misguided) pluck, the State argues that the unanimity of the Second, Seventh, and Ninth Circuits is itself a reason "why certiorari is warranted in this case." Pet. 24. This Court's usual practice, however, is to step into a legal fray only when the circuit courts are at odds. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").[9]

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[7] The Second Circuit recognized that the Eleventh Amendment barred the imposition of liability against the State institutional defendants pursuant to section 1983. *See* Pet. App. 45a (citing *inter alia Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989)).

[8] *Accord Stanley* v. *Darlington County Sch. Bd.*, 879 F. Supp. 1341, 1363-67 (D.S.C. 1995), *rev'd on other grounds*, 84 F.3d 707 (4th Cir. 1996); *Board of Pub. Educ. for Savannah* v. *Georgia*, No. CV 490-101, 1990 WL 608208, at *6 (S.D. Ga. Sept. 24, 1990) ("*Savannah Board*").

[9] The State implies that *Gomez* and *Los Angeles Branch NAACP* are somehow flawed because they were "decided before this Court's most recent pronouncements" on the Eleventh Amendment. Pet. 24. But in 1985—two years before *Gomez* was

That the EEOA abrogates state sovereign immunity is not only the unanimous view of the courts of appeals, it is the legally correct view. "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' " *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1123 (1996) (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786 (1991)). The language of the EEOA—specifically, 20 U.S.C. §§ 1703 and 1706—meets this standard. *See Gomez*, 811 F.2d at 1037 (concluding, based upon sections 1703 and 1706, that it is "clear" that the EEOA abrogates state sovereign immunity); *Los Angeles Branch NAACP*, 714 F.2d at 951 (EEOA "clearly" abrogates Eleventh Amendment); *Stanley* v. *Darlington County Sch. Bd.*, 879 F. Supp. 1341, 1365 (D.S.C. 1995) ("The EEOA clearly manifests Congress' intent to abrogate Eleventh Amendment immunity for suits brought under the EEOA"), *rev'd on other grounds*, 84 F.3d 707 (4th Cir. 1996); *Savannah Board*, 1990 WL 608208, at *6 ("Congress' intention to abrogate the states' immunity is clearly expressed in the text of the [EEOA]").[10]

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decided—this Court could say that the requirements for Eleventh Amendment abrogation were already "well established in our cases." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Although *Dellmuth* v. *Muth*, 491 U.S. 223 (1989)—the only recent case other than *Atascadero* on which the State relies heavily—was decided after *Gomez*, both *Stanley* and *Savannah Board* cite *Dellmuth* but hold that the EEOA abrogates Eleventh Amendment immunity. At all events, as shown below, this holding is in no way contrary to *Atascadero* or *Dellmuth*.

[10] The State does not dispute that the EEOA was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe*, 116 S. Ct. at 1125. In any event, "[t]here can be no dispute that the EEOA was passed pursuant to the enforcement authority of § 5 of the Fourteenth Amendment." *Gomez*, 811 F.2d at 1037. Section 5, of course, grants Congress abrogation power. *See Seminole Tribe*, 116 S. Ct. at 1125; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976).

Section 1703 provides: "No *State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system" (emphasis added). Creating a judicial remedy for this State-targeted command, section 1706 then provides that "[a]n individual denied an equal educational opportunity * * * may institute a civil action in an appropriate district court of the United States *against such parties*, and for such relief, *as may be appropriate*" (emphasis added). The combined effect of these provisions is clear: "The 'appropriate parties' against whom such a civil action may be instituted as those upon whom the statutory obligations and prohibitions are imposed—namely, the 'State.' " *Stanley*, 879 F. Supp. at 1366. Thus, "[r]ead together, the text of 20 U.S.C. §§ 1703 and 1706 (1988), is specific enough to indicate clearly Congress' unequivocal intent to abrogate." *Savannah Board*, 1990 WL 608208, at *6.[11]

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court relied upon the language of section 5 of the Fourteenth Amendment—in which "Congress is expressly granted authority to enforce 'by *appropriate* legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority," *id.* at 456 (quoting section 5; emphasis added)—to hold that section 5 permits Congress

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[11] Although Congress' intent to abrogate the Eleventh Amendment must be clearly expressed in statutory text, such a clear expression can be found in text lacking "explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring) (fifth vote for majority opinion). *See also Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989) ("[N]o magic words are required for abrogation"), *overruled on unrelated grounds*, *Seminole Tribe*, 116 S. Ct. at 1124-1132. Here, sections 1703 and 1706 "together convey a message of unmistakable clarity." *Union Gas*, 491 U.S. at 8.

to abrogate the Eleventh Amendment.[12] Since section 1703 cannot be read as anything other than an express limitation on state authority, *compare* § 1703 ("No State shall deny equal educational opportunity to an individual on account of his or her race") *with* U.S. Const., Amend. XIV, § 1 ("No State shall * * * deny to any person within its jurisdiction the equal protection of the laws"), a suit against a State must be deemed a suit against an "appropriate" party under section 1706.[13]

The decision below is not contrary to *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), or *Dellmuth* v. *Muth*, 491 U.S. 223 (1989). In the former, this Court admonished that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S. at 246. In the latter, this Court rejected an attempt to distinguish *Atascadero* on the ground that, in addition to a general authorization for suit, the statute at issue also made "frequent reference to the States." 491 U.S. at 232. In neither case, however, was there any provision, comparable to section 1703, which makes unmistakably plain Congress' intent that it is appropriate to bring suit under the EEOA against a State.

The statute at issue in *Atascadero* was the Rehabilitation Act, which at that time afforded relief against "any recipient of Federal assistance." 29 U.S.C. § 794a. The

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[12] The *Fitzpatrick* Court said: "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456.

[13] *Cf. Winbush* v. *Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995) (holding that the provision of Title VII giving courts power to grant any "equitable relief as the court deems *appropriate*," 42 U.S.C. § 2000e-5(g)(1) (emphasis added), abrogates the Eleventh Amendment to allow awards of prejudgment interest on damages against States); *Pegues* v. *Mississippi State Employment Serv.*, 899 F.2d 1449, 1454 (5th Cir. 1990) (same).

Court held that this "general authorization for suit in federal court" was insufficient to abrogate state sovereign immunity because it did not "subject the States to federal jurisdiction * * * specifically." 473 U.S. at 246. Sections 1703 and 1706, however, "do not simply authorize relief against a general, undefined class of defendants that may or may not include the state and its agencies." *Stanley*, 879 F. Supp. at 1366-67 n.16. Rather, section 1706 authorizes suits in federal court against "appropriate" parties and section 1703 "mentions specifically the state," *Savannah Board*, 1990 WL 608208 at *6, and "expressly contemplates that relief is to be obtained from the state." *Gomez*, 811 F.2d at 1038. Thus, there is no conflict between *Atascadero* and the Second Circuit's decision in this case. *See id.* at 1037-38 (distinguishing *Atascadero*); *Stanley*, 879 F. Supp. at 1366 n.16 (same); *Savannah Board*, 1990 WL 608208 at *6 (same).

Nor is the decision below contrary to *Dellmuth*. As in *Atascadero*, the statute at issue in *Dellmuth*—the Education of the Handicapped Act ("EHA")—contained little more than a general authorization for suit in federal court. The Court rejected the attempt of the proponent of abrogation to distinguish *Atascadero* on the ground that "the EHA 'is replete with references to the states,' " 491 U.S. at 232 (quoting the respondent's brief), saying that this created nothing more than "a permissible inference" that the Congress intended for States to be amenable to suit in federal court. *Id.*[14] There is, however, nothing in the EHA akin to section 1703's express injunction against the States and section 1706's authorization of suit against "appropriate" parties—language that collectively creates much more than a mere permissible inference that Congress intended abrogation. Thus,

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[14] *But cf. Seminole Tribe*, 116 S. Ct. at 1124 ("[T]he numerous references to the 'State' in the text of [the Indian Gaming Regulatory Act] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit").

although the Court could say in *Dellmuth* that the EHA did not "address abrogation in even oblique terms" and "in no way intimate[d] that the States' sovereign immunity is abrogated," 491 U.S. at 231, the same certainly cannot be said here.

2. The Second Circuit also held correctly that the State institutional defendants were liable under the EEOA. In the EEOA, Congress declared it to be the policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." 20 U.S.C. § 1701(a)(1). As noted above, section 1703 of the EEOA provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced [race-based] deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system." The EEOA defines the term "educational agency" as a "State education agency" or a "local educational agency." *Id.* at 1720(a). Under the plain language of the EEOA, then, a State denies equal educational opportunity "by" the failure of a local educational agency to eliminate the vestiges of segregation. Therefore, the Second Circuit correctly held that the principles articulated by the Sixth Circuit in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), supported the imposition of "supervisory" liability on the State institutional defendants under the EEOA on the same facts that warranted the imposition of liability on the State officials under the Equal Protection Clause and section 1983. *See* Pet. App. 48a-49a.

The State contends that the Second Circuit concluded that liability under section 1703(b) of the EEOA "is broader than the Fourteenth or Fifth Amendments," Pet. 27, in conflict with *United States* v. *Texas*, 680 F.2d 356 (5th Cir. 1982). In that case, the district court held that Texas had engaged in unlawful segregation of students

in violation of the Fourteenth Amendment and the EEOA, including section 1703(b). The Fifth Circuit reversed, holding that the evidence was insufficient to establish a violation of the Equal Protection Clause or section 1703(b), since the putative EEOA violation "rest[ed] on the same factual premises" as the equal protection violation. 680 F.2d at 371.

There is no conflict between the Fifth Circuit's decision and the decision below. The Fifth Circuit held that certain evidence *insufficient* to establish an equal protection violation was also insufficient to establish an EEOA violation. Here, the Second Circuit held that evidence *sufficient* to establish an equal protection violation also established an EEOA violation. There is no logical inconsistency between these holdings. Moreover, the State is incorrect when it asserts that the Second Circuit held that the EEOA is broader than the Equal Protection Clause. Rather, it stated that "the EEOA provides protections *similar* to those provided by the Equal Protection Clause." Pet. App. 47a (emphasis added). Since the Second Circuit imposed liability under the EEOA based upon the same factual findings for which it imposed liability under the Equal Protection Clause, it is not necessary to the Second Circuit's decision for the EEOA to go beyond the Equal Protection Clause and the judgment below can stand even if that proposition is untrue.

Finally, accepting for purposes of argument that *State of Texas* stands for the proposition that the EEOA is no broader than the Equal Protection Clause, there are other expressions in Fifth Circuit case law to the contrary. *See Castaneda* v. *Pickard*, 648 F.2d 989, 1001 (5th Cir, 1981) (the EEOA "makes unlawful practices, such as segregation of students on the basis of sex, which may not violate the fourteenth amendment"); *United States* v. *Hinds County Sch. Bd.*, 560 F.2d 619, 623 (5th Cir. 1977) (the declaration of policy in 20 U.S.C. § 1702(a)(1) "expressly goes beyond the rights guaran-

teed to school children under the Fourteenth Amendment prior to the EEOA's adoption"). Given the tension in the Fifth Circuit's own cases, even if there were a conflict between the decision below and *United States* v. *Texas* (which there is not), such conflict would not warrant review prior to the Fifth Circuit's clarification of its law. *See Wisniewski* v. *United States*, *supra*.[15]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

DAVID G. LEITCH*
STEVEN J. ROUTH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5822

* Counsel of Record

Counsel for Respondent Yonkers Board of Education

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[15] As with the State officials, *see* note 6, *supra*, the judgment of liability against the State can also be defended on the basis of Title VI. Respondents reserve their right to raise Title VI in support of the judgment below in any future proceedings. The States' Eleventh Amendment immunity is expressly abrogated for Title VI claims. 42 U.S.C. § 2000d-7. *See Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) ("In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975").

No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNET; ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY;

(caption continued on inside front cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CITY OF YONKERS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAYMOND P. FITZPATRICK, JR.
Counsel of Record
R. SCOTT CLARK
FITZPATRICK, COOPER & CLARK
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-2255

Attorneys for Respondent City of Yonkers

and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO as Director of the Urban Development Corporation,

Petitioners,

vs.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. WHETHER THE SECOND CIRCUIT, APPLYING WELL-ESTABLISHED PRECEDENT TO THE AMPLY SUPPORTED FACTUAL FINDINGS IN THIS CASE, CORRECTLY FOUND THE STATE PETITIONERS LIABLE FOR INTENTIONAL SEGREGATION WHERE STATE OFFICIALS "FAILED TO EXERCISE THEIR AUTHORITY AND FAILED TO FULFILL THEIR RESPONSIBILITY TO TAKE STEPS TO ACHIEVE DESEGREGATION IN YONKERS, AND INSTEAD TOOK ACTIONS THAT ENCOURAGED THE PERPETUATION OF SEGREGATION, BECAUSE OF THEIR DEFERENCE TO THE RACIALLY INSPIRED POSITIONS OF THE LOCAL OFFICIALS AND THE KNOWN ANTI-DESEGREGATION STANDS OF OTHER STATE OFFICIALS."

2. WHETHER THE SECOND CIRCUIT'S HOLDING THAT THE EQUAL EDUCATIONAL OPPORTUNITY ACT (EEOA) EXPRESSLY ABROGATES THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO THE EXTENT NECESSARY TO EFFECTUATE THE PURPOSES OF THE EEOA IS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS WHERE THE STATUTE EXPRESSLY PROHIBITS STATES FROM DENYING EQUAL EDUCATIONAL OPPORTUNITY AND AUTHORIZES SUITS AGAINST STATE AND LOCAL EDUCATIONAL AGENCIES.

3. WHETHER THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY AGAINST THE STATE UNDER THE EEOA IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND THE PREVIOUS DECISIONS OF THE COURTS OF APPEALS.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, respondent City of Yonkers states that it does not have a corporate parent, subsidiary, or affiliate.

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No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK, et al.,

Petitioners,

vs.

YONKERS BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT CITY OF YONKERS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Yonkers, New York ("the City") respectfully asks this Court to deny the State of New York's petition for writ of certiorari filed in this cause. Given strong factual findings in the district court, the United States Court of Appeals for the Second Circuit properly concluded that the State of New York and its officials were liable for school segregation in the City of Yonkers where the State petitioners (1) knew of de jure school segregation in Yonkers, New York, and (2) "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known

anti-desegregation stance of other state officials." *United States v. City of Yonkers*, 96 F.3d 600, 618–19 (2d Cir. 1996); Pet. App. at 44a. The Second Circuit's decision is wholly consistent with the previous decisions of this Court and of the several Courts of Appeals and does not warrant this Court's review.

OPINIONS BELOW

Respondent City of Yonkers adopts the petitioners' statement of opinions below. Pet. at 2.

JURISDICTION

Respondent City of Yonkers adopts the petitioners' statement of jurisdiction. Pet. at 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent City of Yonkers adopts the petitioners' statement of constitutional and statutory provisions involved. Pet. at 2.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

In 1985, the United States District Court for the Southern District of New York found that the Yonkers Public Schools were unconstitutionally segregated. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (1985) ("*Yonkers I*").[1] The district court found the City of Yonkers liable for discrimination in housing and education, the Yonkers Board of Education ("Board") liable for school segregation and, in 1986, entered appropriate remedial orders. *See id; United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986) (School Desegregation Order) ("*Yonkers II*") and 635 F.

[1] The City adopts the Second Circuit's short titles for the many decisions in this longstanding litigation.

Supp. 1577 (S.D.N.Y. 1986) (Housing Remedy Order).[2] The Second Circuit affirmed these decisions, and this Court denied review. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) ("*Yonkers III*"), *cert. denied*, 486 U.S. 1055 (1988).

In 1987, the NAACP moved to add the State of New York, certain State officials, and the New York State Urban Development Corporation ("UDC") as parties defendant. Pet. App. at 157a–169a. The Board similarly sought leave to file a cross-claim against these added State defendants. Pet. App. at 140a–156a. The NAACP and the Board alleged that the State defendants should be compelled to participate in the existing school and housing remedies and to assist in eliminating the vestiges of school segregation, because the State defendants had known of the de jure segregation in Yonkers and had the authority and duty to eliminate segregation, but had, through action and inaction, contributed to school and housing segregation in response to race-related political pressures. *See* Pet. App. at 140a–169a. Although denying that there were additional vestiges of segregation in the Yonkers Public Schools for which the City should be held responsible, the City supported the NAACP's and the Board's claims that the State defendants were liable for segregated conditions in Yonkers. *See* Pet. App. at 6la.

After some procedural delay and several interlocutory, immunity-based appeals by the State defendants, the district court severed the issues raised in the 1987 complaint and

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[2] Proceedings involving the 1986 Housing Remedy Order have taken a favorable turn in the recent past. On November 6, 1996, the district court, on consent of the parties, entered the Second Supplemental Long Term Plan Order, providing a means to implement all remaining aspects of the Housing Remedy Order. Under the 1996 Order, control over the administration of the remedy has been returned to the City of Yonkers and its Mayor from court-appointed agents. The City of Yonkers has established its own Affordable Housing Department which is aggressively seeking to create affordable housing opportunities for qualified applicants in all parts of Yonkers.

cross-claim for trials on the issues of (1) whether unaddressed vestiges of unlawful segregation continue in the Yonkers Public Schools; (2) whether the State defendants are liable; and (3) what remedies are appropriate. After hearing evidence related to the vestiges issue, the district court determined that the Board had "achieved desegregation of enrollments among the schools," but that vestiges of segregation remained to be remedied. *See United States v. City of Yonkers,* 833 F. Supp. 214, 216 (S.D.N.Y. 1993) ("*Yonkers IV*").[3]

In the spring of 1994, the district court held a six-week trial on the issue of whether the State defendants should be held liable for the segregated conditions found by the Court in its 1985 liability decision as well as for the vestiges of segregation in the Yonkers Public Schools. As the Second Circuit noted, "the [district] court received thousands of exhibits and received testimony from more than 30 witnesses, including members and former members of the New York Board of Regents, a former Commissioner, a former Deputy Commissioner, key officials from the State Education Department" and "City officials and community leaders who had interacted with [the State defendants] on school and housing matters." Pet. App. at 8a. The district court issued two liability opinions. The first included the bulk of its factual findings and addressed the claims against the State defendants under the Equal Protection Clause and 42 U.S.C. § 1983. *See United States v. City of Yonkers,* 880 F. Supp. 212 (S.D.N.Y. 1995) ("*Yonkers V*"); Pet. App. at 56a–117a. The second addressed the claims against the State defendants under Title VI and the Equal Educational Opportunity Act ("EEOA"). *See United States v. City of Yonkers*, 888 F. Supp. 591 (S.D.N.Y. 1995) ("*Yonkers VI*"); Pet. App. at 118a–137a.

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[3] The district court's vestiges decision has not yet been embodied in a final judgment and, therefore, was not before the Second Circuit on appeal. Pet. App. at 7a. The district court also has not yet addressed remedy issues.

B. The District Court's Opinions.

In its first State liability opinion, the district court made extensive factual findings based upon the evidence it had heard and received during the 1994 State liability trial. The State defendants largely ignore these findings in their petition for certiorari because, as the Second Circuit noted, these findings were "largely favorable to plaintiffs." *See* Pet. App. at 8a. Indeed, the State defendants challenged only one of these factual findings on appeal. *See* Pet. App. at 34a.

Specifically, the district court found that the State defendants "knew of the segregation in Yonkers, had actual or constructive knowledge that this segregation was de jure, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *See* Pet. App. at 31a–32a. The Second Circuit affirmed these factual findings and summarized them, as follows:

> In detail, the district court found, *inter alia,* that
>
> > - the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"
>
> *Yonkers V,* 880 F. Supp. at 219, 220;
>
> > - the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"
>
> *id.* at 220;
>
> > - the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"
>
> *id.* at 245;

- the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily,"

id. at 219, 220. The court also found, *inter alia,*

- that in other communities, Commissioner Nyquist had "not hesitate[d] to enforce the [New York] racial integration policy,"

id. at 225;

- that the legislature responded to Nyquist's desegregation efforts with a statute that "prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions,"

id.;

- that, after that statute was declared unconstitutional, the legislature took other actions whose "purpose and intended effect" were "similar" and "had the cumulative effect of undermining efforts to reduce school segregation,"

id.;

- that the legislature also adopted "a new practice" of having candidates for the Board of Regents be "interviewed prior to appointment by legislators . . . who were known to be hostile to vigorous desegregation efforts,"

id.;

- that the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force,"

id.;

> - that this revision was a response to "criticism of Commissioner Nyquist's vigorous desegregation efforts,"

id.;

> - that the Board of Regents lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders in an effort to "rein in Nyquist's desegregation efforts,"

id. at 226; and

> - that the Board of Regents finally simply fired Nyquist; "[h]is views on [integration] were a substantial factor leading to his discharge,"

id.

United States v. City of Yonkers, 96 F.3d at 614; Pet. App. at 32a–34a (omissions and alterations in original).[4]

Notwithstanding these strong factual findings, the district court stated that it was "constrained" to find that the State defendants were not liable under the district court's interpretation of the Second Circuit's opinion in *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir.), *cert. denied,* 439 U.S. 860 (1978). Pet. App. at 116a. In essence, the district court believed that proof of specific approval and support of local authorities' unlawful conduct, and not mere knowing inaction or action, was necessary to impose liability upon the State defendants under *Arthur. See* Pet. App. at 98a–99a. The district court explained, however, that it reached this conclusion "with reluctance," because it found "entirely unpersuasive" the State defendants' arguments that they lacked full knowledge of the nature,

---

[4] In their Statement of the Case, the State petitioners present factual arguments regarding alleged efforts of the State with regard to desegregation. Pet. at 5–6. These "facts" were not found by the district court and are, indeed, directly contrary to the actual findings of the district court described above, as affirmed by the Second Circuit. State petitioners improperly raise these factual arguments here.

cause and extent of segregation in the Yonkers Public Schools, and that they "lacked the power to address adequately the problem of school segregation." Pet. App. at 116a.

In its second liability opinion, the district court addressed issues concerning State liability under Title VI and the EEOA. Based largely upon its interpretation of *Arthur v. Nyquist,* the district court similarly held that the State defendants were not liable for school segregation under these statutes. *See* Pet. App. at 118a–137a, 24a–25a.

C. The Second Circuit's Decision.

The Second Circuit determined that the district court's findings of fact were supported by the evidence; concluded that those findings distinguished the *Yonkers* case from the *Arthur* decision and warranted the imposition of State liability; and vacated the district court's dismissal of the equal protection and EEOA claims against the State defendants. The Second Circuit began its analysis of the equal protection claims by restating well-established "fundamental principles governing equal protection claims" that the Second Circuit had previously set forth in its consideration of City and Board liability in the first *Yonkers* appeal. *See Yonkers III,* 837 F.2d at 1216–17, 1222–26. The Court of Appeals explained that a plaintiff must show that the State action complained of was motivated at least in part by a racially discriminatory purpose. The Court then repeated its *Yonkers III* holding that "the foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." Pet. App. at 28a (quoting *Yonkers III,* 837 F.2d at 1227 (other internal quotation marks omitted)).

After thoroughly reviewing the evidence before the district court, the Second Circuit concluded that "the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew

or should have known that the school segregation in Yonkers was de jure." Pet. App. at 37a. The Court of Appeals explained that these "amply supported factual findings" distinguished the case from *Arthur v. Nyquist,* because in *Arthur* there had been insufficient evidence to show that the State officials had abdicated their duty to attempt to achieve desegregation. *United States v. Yonkers,* 96 F.3d at 617; Pet. App. at 40a–41a. The Second Circuit accordingly concluded that the State defendants' knowledge of Yonkers segregation, their failure to exercise their authority and responsibility to achieve desegregation in Yonkers, and their actions and omissions taken in reaction to "racially inspired positions of the local officials and the known anti-desegregation stance of other state officials" were a sufficient basis for liability under § 1983 for prospective injunctive relief to remedy vestiges of school segregation in Yonkers. *Id.* at 618–19; Pet. App. at 41a–44a.

The Court of Appeals similarly held that the State defendants were liable under the EEOA. The Court reasoned that the EEOA imposed "on States the obligation to enforce the equal-educational-opportunity obligations of local educational agencies," and provided protections similar to those provided by the Equal Protection Clause. *Id.* at 620; Pet. App. at 47a. Because it had found the State defendants liable under Section 1983 and the EEOA, the Court of Appeals declined to address the plaintiffs' Title VI claims. *See id.* at 621; Pet. App. at 51a.

The Second Circuit vacated the judgment of the district court, which had dismissed the claims against the State defendants, and remanded the case for further proceedings. *Id.* at 623; Pet. App. at 55a. The Second Circuit denied the State's request for en banc consideration. Pet. App. at 138a–139a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SECOND CIRCUIT, APPLYING WELL-ESTABLISHED PRECEDENT TO THE AMPLY SUPPORTED FACTUAL FINDINGS IN THIS CASE, CORRECTLY FOUND THE STATE DEFENDANTS LIABLE FOR CONTRIBUTING TO SEGREGATION.

Given the district court's "amply supported factual findings," there is nothing remarkable about the Second Circuit's finding of State liability. This Court has clearly held that liability exists where the state action complained of was taken with the intent to discriminate. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). A plaintiff must establish that race was "a motivating factor," and can do so in several ways. The Second Circuit has now twice discussed in this case the circumstances under which state action or inaction taken in response to racially motivated political pressure can serve as a basis of liability. *See Yonkers III*, 837 F.2d at 1216–18, 1221–27; Pet. App. at 26a–31a. In *Yonkers III*, the Court of Appeals stated that "adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, is a factor that may be taken into account in determining whether acts were undertaken with segregative intent," *Yonkers III*, 837 F.2d at 1227 (internal quotation marks omitted), and concluded "that the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet. App. at 28a. These standards of liability are well-established and not disputed, although they are largely ignored in the State's petition.

The Second Circuit in the present appeal did nothing more than apply these precedents to the "amply supported factual findings" in this case. The Second Circuit concluded that "the

record evidence amply supports the district court's finding that the State Defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was de jure." Pet. App. at 37a. The record is replete with evidence that officials of the State Education Department ("SED") had abundant contact with the Yonkers Public Schools, knew of the unremedied segregation in the schools, and reacted to state and local opposition to desegregation. *See* Pet. App. at 34a–37a. The Court of Appeals also determined that there was "ample support" for the district court's "finding that the failure of SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of heavy pressure from the New York State legislature." Pet. App. at 37a–38a.

In its petition, the State petitioners seek to recharacterize the findings of the district court by arguing that liability in this case was based "solely" on the determination that State officials "failed to exercise [their] power in a way the court believed would have been more effective." Pet. at 14. The State, however, ignores both the Second Circuit's and the district court's determination that State officials both acted and failed to act in response to racially motivated political pressures. The district court specifically found that the New York Legislature had passed legislation intended to undermine efforts to reduce school desegregation; that the Legislature sought to have candidates for the Board of Regents interviewed by "legislators . . . who were known to be hostile to vigorous desegregation efforts"; and that the Board of Regents fired Education Commissioner Nyquist and that "[h]is views on [integration] were a substantial factor leading to his discharge." Pet. App. at 76a–80a, 32a–34a.

State liability here is not based on mere inaction. Rather, it is grounded in the trial and appellate courts' determination that State officials had full knowledge of school segregation in Yonkers and that those State officials "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took

actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." Pet. App. at 44a.

Throughout their argument, the State petitioners also suggest that their actions and inaction were not causally related to the continuing segregation in the Yonkers Public Schools. The State petitioners boldly assert that "no *state* governmental policy existed as the moving force behind the constitutional deprivation which occurred in Yonkers." Pet. at 13 (emphasis in original). This contention is incorrect and directly contrary to the findings of the district court. In the portion of its findings entitled "The Effect on Yonkers of the State's Failure to Intervene," the district court very carefully detailed its findings concerning the causal relationship between State action and inaction and the continuing segregation. *See* Pet. App. at 80a–82a. The district court expressly found that "there is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions," Pet. App. at 80; that the State defendants "altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform," *id.*; and that by delaying funding for desegregation, the State "enabled opposition to the reform efforts to coalesce to a point where the [Board] became hostile to the very desegregation initiative it had originally commissioned." Pet. App. at 8la. Additionally, the district court concluded that the Board of Regents' firing of Commissioner of Education Ewald Nyquist, which the court found to be based on Nyquist's pro-desegregation positions, "bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone." Pet. App. at 82a. The State did not challenge these factual findings on appeal and, in any event, the Second Circuit found that the district court's factual findings were amply supported by the extensive record in this case. There can be little doubt that the district court determined — as a matter of fact — that the State's action and inaction contributed to and perpetuated school segregation in the Yonkers Public Schools.

Consistent with well-established precedent and the factual findings of the district court, the Court of Appeals correctly concluded that the State officials were liable under the Fourteenth Amendment and § 1983 for prospective injunctive relief to remedy school segregation in Yonkers for which they were responsible. This fact-intensive determination does not break new ground or merit review by this Court.

II. THE SECOND CIRCUIT'S HOLDING THAT THE EEOA EXPRESSLY ABROGATES THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO THE EXTENT NECESSARY TO EFFECTUATE THE PURPOSES OF THE EEOA IS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

The State also contends that the Second Circuit's holding that the EEOA expressly abrogates Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA is "aberrant" and "worthy of review." Pet. at 21. The State is wrong on both counts. The Second Circuit's holding is consistent with the plain language of the statute, the decisions of this Court, and the decisions of the two other Circuit Courts of Appeals that have addressed this issue.

From the face of the statute, it is clear that Congress enacted the Equal Educational Opportunity Act pursuant to its authority under § 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment. *See Castaneda v. Pickard*, 648 F.2d 989, 1008 n.9 (5th Cir. 1981). This Court has explained that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citations omitted). The present statute, the EEOA, represents Congress' statutory means of enforcing

the provisions of the Fourteenth Amendment as against the States in the school desegregation context.

The State of New York, however, claims that the application of the EEOA to the State in this case runs afoul of the Eleventh Amendment and of the clear-statement rule announced and explained in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and subsequent decisions of this Court. In *Atascadero,* this Court held that "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 242. In subsequent decisions, this Court has further explained that congressional intent to abrogate Eleventh Amendment immunity must be both "unequivocal" and "textual." *See, e.g., Seminole Tribe of Florida v. Florida,* 134 L. Ed. 2d 252 (1996).

The EEOA and its prohibitions are specifically and pointedly addressed to the States. Even under this Court's strict clear-statement rule, Congress' intent to abrogate Eleventh Amendment immunity as to the EEOA is both unequivocal and textual. In the decision below, the Second Circuit correctly held that the EEOA expressly abrogates "the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA," reasoning as follows:

> The EEOA (or the "Act") provides that "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 (emphasis added). Further, the Act forbids the state to perpetrate such a denial through various acts or omissions of an "educational agency." *See id.* §§ 1703(a)–(f). The Act defines "educational agency" as "a local educational agency or a 'State educational agency.'" *id.* § 1720(a) (emphasis added); *see also Idaho Migrant Council v. Board of Education,* 647 F.2d 69, 71 (9th Cir. 1981) (educational agency as used in EEOA includes a "state board of education").

United States v. Yonkers, 96 F.3d at 619; Pet. App. at 45a. The Second Circuit explained that the text of the EEOA explicitly provides that "[n]o state" shall engage in the prohibited conduct and expressly applies the EEOA prohibitions and remedies to "State educational agencies." Pet. App. at 45a–51a.

The Second Circuit's decision is consistent with the decisions of the two other Circuits that have addressed this issue. For instance, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1986), the Seventh Circuit engaged in the textual analysis required by *Atascadero* and its progeny and determined that the language of the EEOA plainly abrogated Eleventh Amendment immunity. The court reasoned that the EEOA specifically prohibited "states" from denying equal educational opportunities to individuals and imposed its restrictions and remedies directly on state educational agencies. *Id.* at 1037–38. The Ninth Circuit likewise has held that "the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies," and abrogates Eleventh Amendment immunity. *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). *See also Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981). To hold otherwise would mean that Congress through the EEOA intended to impose the obligations of the EEOA on the States and their agencies, but did not intend to make the States and their agencies proper parties defendant under the terms of the EEOA. Such a reading of the statute makes little sense.

Additionally, to the extent that the Second Circuit's opinion requires the State to participate in the remedial desegregation efforts in Yonkers, it provides prospective injunctive relief consistent with this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken*, as here, the State defendants – who were found liable for school segregation – argued that the Eleventh Amendment prevented the federal court from requiring the State to participate in the

desegregation remedy. This Court flatly rejected that argument, as follows:

> The decree to share the future costs of educational components in this case fits squarely within the prospective compliance exception reaffirmed by *Edelman.* That exception, which had its genesis in *Ex parte Young,* 209 U.S. 123 [(1908)], permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system.

Id. at 289 (citation omitted). The Court concluded that "such prospective relief is not barred by the Eleventh Amendment." *Id.* at 290.

Here, as in *Milliken,* the Second Circuit has found the State liable for school segregation and now requires it to participate in prospective injunctive relief to remedy any vestiges of school segregation in Yonkers. Such relief falls squarely within the prospective-compliance exception reaffirmed by *Edelman v. Jordan,* 415 U.S. 332 (1974), and *Milliken*, notwithstanding an impact upon the state treasury. The Second Circuit's decision is consistent with the decisions of this Court and with the decisions of the Courts of Appeals and does not merit review.

III. THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY AGAINST THE STATE UNDER THE EEOA IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND THE PREVIOUS DECISIONS OF THE COURTS OF APPEALS.

The State's final argument that the EEOA does not provide a basis for liability here is utterly specious. The State contends that imposition of liability against the State under the EEOA is inconsistent with the language of the statute and the Fifth Circuit's opinion in *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982). Even a cursory reading of the statute and that case shows that the State misunderstands both.

The EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by —
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . .

20 U.S.C. § 1703; Pet. App. at 193a–194a. In its petition for certiorari, the State awkwardly concedes that this clear language *"might perhaps be read* as imposing on the States affirmative obligations." Pet. at 25 (emphasis added). The State then argues that the Court should abandon the plain language of the statute and adopt a "more natural reading" substituting "state action" for "State." *Id.* The State's argument is flawed and contrary to both the statute and case law.

The Second Circuit correctly held that the EEOA "provides substantive protections that 'considerabl[y] overlap . . . those

provided under the Fourteenth Amendment.' " Pet. App. at 47a (quoting *United States v. School District of Ferndale, Michigan,* 577 F.2d 1339, 1346 (6th Cir. 1978)). *Accord Castaneda v. Pickard,* 648 F.2d 989, 1001 (5th Cir. 1981). The Second Circuit explained that the EEOA also imposes on States the obligation to enforce the equal educational opportunity obligations of its state and local educational agencies. Pet. App. at 47a. The Second Circuit's decision here is consistent with both the decision of the Sixth Circuit in *School District of Ferndale* and the decision of the Fifth Circuit in *Castaneda.* The State points to no case contrary to this holding. Indeed, even the district court in this case explained that "it can be argued that if one were to set about to write a statute in a way that provided for vicarious State liability, one could not find language that was more clear and direct than that contained in § 1703 of the EEOA." Pet. App. at 105a. The State's imaginative reading of this statute does not warrant this Court's review.

The State also seeks this Court's review based upon an imagined conflict between the Second Circuit's decision here and the Fifth Circuit's decision in *United States v. State of Texas,* 680 F.2d 356 (5th Cir. 1982). The Fifth Circuit's decision in *United States v. State of Texas* was based on a truly bizarre set of facts. *See id.* at 370 ("The case is unique, and we proceed to the resolution of its appeal without great assurance or satisfaction."). In that case, the district court had based its finding of liability upon a stipulation that had been entered into by an inexperienced Assistant Attorney General who acted "without authority from her client and, in fact, in general disregard of its instructions to her." *Id.* at 368. The Fifth Circuit concluded that "a proceeding so fundamentally flawed" could not serve as a basis for liability or for the remedial orders entered by the district court. *Id.* The Fifth Circuit's decision in *United States v. State of Texas* was fact intensive and in no way conflicts with the considered legal holdings of the Second Circuit in this case, which were based on "amply supported factual findings" in the district court. The State here attempts to create a conflict where there is none.

CONCLUSION

The Second Circuit's decision in this case is entirely consistent with the decisions of this Court and the Courts of Appeals, and is supported by the district court's clear factual findings. The State has for too long avoided its responsibility to participate in the desegregative efforts of the Yonkers Public Schools. The City of Yonkers respectfully asks this Court to deny the State's petition for writ of certiorari.

Dated: May 23, 1997

Respectfully submitted,

RAYMOND P. FITZPATRICK, JR.
Counsel of Record
R. SCOTT CLARK
FITZPATRICK, COOPER & CLARK
Farley Building, Suite 600
1929 Third Avenue North
Birmingham, Alabama 35203
(205) 320-2255

Attorneys for Respondent
City of Yonkers

No. 96-1628

(6)

Supreme Court, U. S.
F I L E D
JUN 11 1997

IN THE

Supreme Court of the United States

October Term, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN, LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN, SAUL B COHEN; JAMES C. DAWSON; ROBERT M. BENNET; ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO as Director of the Urban Development Corporation,

Petitioners,

v.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BARBARA G. BILLET*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
MARION R. BUCHBINDER
Assistant Attorneys General

**Counsel of Record*

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Petitioners
The Capitol
Albany, NY 12224
(518) 474-8101

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-1628

THE STATE OF NEW YORK, et al.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

POINT I

THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY AGAINST STATE OFFICIALS FOR NOT UNDOING THE *DE JURE* SEGREGATION CREATED BY LOCAL OFFICIALS WARRANTS REVIEW BY THIS COURT

The briefs filed by respondents NAACP, the Yonkers Board and the City of Yonkers in opposition to the petition for a writ of certiorari rely heavily on the Second Circuit's statements to the effect that the State affirmatively "encouraged" segregation in Yonkers. Yet they do not and cannot demonstrate that this conclusion is supported by the record or consistent with the factual findings of the district court adopted by the Second Circuit. Thus, the reliance is misplaced.

Respondents seize upon the language of the Second Circuit which describes the district court as having found that the State acted so as to encourage the perpetuation of segregation (12a, 41a). However, the district court never concluded that the State had encouraged the segregation in Yonkers. In fact, it concluded just the opposite. The district court found that "[t]here is no evidence that State education officials ever undertook affirmative actions to preserve segregation in the Yonkers schools . . . " (75a), and "there is no evidence of any affirmative pro-segregative action on the part of the State" (98a). While the court did find that the State had become "increasingly passive and reactive" (99a), it also found that the State's

> "permissiveness . . . [is] not automatically tantamount to state encouragement and/or authorization of segregation. That anti-desegregation groups in Yonkers tried to find in the State's permissiveness signs of actual, positive support for their position says something about the

> political forces at work in Yonkers; but it does not without more transform the State's failure to intervene in Yonkers into affirmative support of school segregation . . . " (99a; citations omitted).

In the section of its opinion on the effect on Yonkers of the State's "failure to intervene" (80a), what the district court did hold was that the perceived retrenchment in the efforts of state officials to combat segregation—what the court labeled the state officials' "wait-and-see" approach (75a)—"altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform" (80a). As the court itself recognized, this was a "subtle" effect of the state officials' perceived hands-off attitude (80a). Since the district court did not view the State's actions as tantamount to affirmative encouragement of segregation, it was a mistake for the Second Circuit to so characterize the district court's opinion.

Two occurrences apparently viewed by the Second Circuit as supportive of segregation, the passage of Chapter 342 of the Laws of 1969[1] and the elimination of the Racial Balance Fund in 1971, were acts of the Legislature, not the petitioner state officials.[2] Chapter 342 was invalidated one year after its enactment in *Lee v. Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *aff'd,* 402 U.S. 935 (1971), and it was never enforced against any school district in the State. In response to an inquiry from the State Education Department to all school districts when the Racial Balance Fund was eliminated, the

---

[1]Chapter 342 was essentially an anti-busing law. Ironically, as we show in our petition, so was the federal Equal Educational Opportunities Act.

[2]The district court viewed these legislative actions as putting pressure on state officials to curtail their desegregation activities (79a), not as state complicity in local segregation.

Yonkers Board advised that elimination of the fund would have no impact on any then current or planned racial balance programs (Trial Ex. S at p. PE00010129). Thus, neither of those legislative initiatives could have been causally related to the segregation there. This is underscored by the 1985 findings of the district court in *Yonkers I* that the segregation in Yonkers was entirely a product of local action.

With respect to the firing of Commissioner Nyquist by the Regents, while the district court found that his aggressively activist stance on integration was a "substantial factor," the court also concluded that "Nyquist's dealings with some Regents was high-handed and offensive and that, to a considerable extent, he precipitated his own removal. In all, we find that the plaintiffs have not proven that Nyquist would not have been fired but for his views on integration" (78a). Again, there is no basis set forth in either of the opinions below for concluding that Nyquist's firing had a direct impact on the segregation in Yonkers.

Respondents do not and cannot dispute that no state policy existed as the moving force behind the creation and maintenance of a segregated school system by the Yonkers Board and the City of Yonkers. Instead, the Yonkers Board argues (Bd. Br. at 11-14), without reference to *Board of Educ., Levittown UFSD v. Nyquist*, 57 N.Y.2d 27, 43 N.E.2d 359 (1982), *app. dsmd., Board of Educ. v. Nyquist*, 459 U.S. 1139 (1983), that state policy imposed on petitioners a duty to undo what the Board and City had done, and that petitioners' failure to satisfy that state law duty justified the Second Circuit's imposition of constitutional liability. This argument runs counter to established precedent of this Court.

A violation of state law neither implicates a cognizable federal interest, nor justifies the imposition of federal constitutional liability upon a State. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 124-125 (1984) (reversing an injunction against state officials based on a state statute). Not only would the grant of relief on such a claim fail to "vindicate the supreme authority of federal law," but "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106. The imposition of liability under 42 U.S.C. § 1983 depends not on violation of a duty imposed by state law but on the violation of a duty imposed by the Constitution or federal statute. Thus, any claim that state officials failed to fulfill a duty under state law to address the segregation in Yonkers is indistinguishable from the claim based on state law in *Pennhurst*, and simply cannot serve as the basis for the relief granted by the Second Circuit.

The Yonkers Board contends (Bd. Br. at 14-16) that even if petitioners did not have the duty to undo the unlawful actions of the Board and City, they could still be held liable if they failed to exercise their discretionary authority for "illegitimate reasons." However, a finding that petitioners "were capitulating to political pressures they knew were racially motivated" (32a), even if true, is not sufficient to serve as an independent foundation for liability under existing § 1983 precedent. This is especially so where, as here, the district court expressly found that the state officials neither "conspired to thwart" the implementation of the State's desegregation policy, nor approved or

supported the unlawful actions taken by the Yonkers Board and the City in violation of that policy (98a).[3]

POINT II

THE SECOND CIRCUIT'S RULINGS WITH RESPECT TO THE EEOA ARE INDEPENDENTLY WORTHY OF REVIEW

Respondents have failed to address in any meaningful respect petitioners' arguments regarding the Second Circuit's statutory holdings. The NAACP's retreat from the issue, through its claim that it is unnecessary to deal with the EEOA because "section 1983 provides an independent basis for liability against petitioners . . . " (NAACP Br. at 5), ignores several aspects of the Second Circuit's statutory rulings. First, the Second Circuit held

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[3] It is appropriate here to address a representation by the Board (footnote 2 of its brief), which is contradicted by the record in this case. The district court's decision to hold in abeyance the motion to join the petitioners was made due to the fact that, at the argument on the motion, counsel for the Board informed the court that joinder of the petitioners was sought because the Board wanted additional state funds to implement additional desegregation-related programs, but could not inform the court of any request for state funding which had been made and denied (Rec. Doc. 787, pp. 3-26). At the same argument, counsel for the State informed the court that the State was already completely financing the operating costs imposed by the desegregation order, and was unaware of any desegregation-related funding requests made by Yonkers which had been denied (Rec. Doc. 787, pp. 42-45). The court stated that, absent a denial by the State for funding, there would be no case or controversy in regard to the Board's cross-claim, and on this basis, it held the joinder motion in abeyance pending a demand by the Board for additional funds and a denial of that demand by the State (Rec. Doc. 787, p. 46).

that the State of New York and the institutional defendants are appropriate defendants under the EEOA, despite these entities' unquestioned 11th Amendment immunity from claims made under § 1983. Second, if, as the Second Circuit has held, the State has no immunity under the EEOA, the remedies available against the State under the statute could well exceed those available against state officials under § 1983. Third, the Second Circuit opined that the State could be held vicariously liable for the local acts of *de jure* segregation, regardless of the State's own actions or inaction—a broad expansion of liability under the EEOA beyond what is provided by § 1983.

The Second Circuit's EEOA holdings are legally incorrect for the reasons stated in our petition for a writ of certiorari. If the court's erroneous interpretation is allowed to stand, it could cause serious mischief in New York and elsewhere, regardless of the ultimate disposition of the § 1983 claim in this case. Certiorari is respectfully requested on this additional ground.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for *Petitioners*
The Capitol
Albany, NY 12224
(518) 474-8101

BARBARA G. BILLET*
Deputy Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
MARION R. BUCHBINDER
Assistant Attorneys General

**Counsel of Record*